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THE MERCHANT'S

AND

SHIPMASTER'S GUIDE,

IN RELATION TO THEIR

RIGHTS, DUTIES AND LIABILITIES,

UNDER THE EXISTING COMMERCIAL REGULATIONS OF THE UNITED STATES, AS ESTABLISHED BY STATUTE, AND ACCORDING TO JUDICIAL DECISIONS IN THIS, AND OTHER COUNTRIES, ON COMMERCIAL LAW.

BY FREDERIC W. SAWYER.

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PREFACE.

This work is designed to meet, what the author believes to be the actual and existing wants of the mercantile community. A work of this kind seems to be not only proper but necessary. The statutes and judicial decisions determining the rights, duties, and liabilities of the merchant and ship-master, have never before been brought together and methodically arranged in a work expressly intended for their use. They have hitherto existed only in works intended for the library of the professional man. This has been compiled, with the exclusive view to furnish a practical and useful work for the counting room and the ship's cabin. In it, it is intended that the merchant and mariner shall find a plain, methodical, and comprehensive view of the principal duties which devolve upon them in their respective situations. These duties are by no means few or unimportant. Commercial transactions, coming as they do, in direct contact with the revenue laws of the country, are necessarily subjected to numerous special statutes and regulations, which must be regarded, or fines and penalties ensue. The whole period of the voyage, from its

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commencement to its termination, is one continued series of duties and liabilities, calling for a clear and precise knowledge of commercial law. In this volume the several statutes regulating the shipping interests of this country are, in a great measure, relieved of their almost unintelligible phraseology, and methodically arranged under appropriate heads. The masters' and merchants' rights and duties, as established by commercial law, are here brought together, and, as the author believes, so arranged as to be susceptible of rendering very essential service to them.

Commercial transactions have always presented fruitful sources of litigation. This has arisen not entirely from the complexity of commercial affairs. Much of it is attributable to the difficulty of procuring advice, when most needed, by those having charge of such adventures. Most men, when involved in new and unexpected relations, have, usually, the power to call to their aid the assistance of competent advisers. But the ship-master is not thus situated. The very time that he most needs counsel, is generally, of all others, the time when it is impossible for him to obtain it. It seems, then, desirable, that he should have some book at hand to afford him useful advice, when overtaken by disaster.

Another consideration why the ship-master should be possessed of a work of this character is, that they, more than any other class, have been made the subjects of special enactments. To very many of their acts and omissions, which, in themselves considered, are light and unim-

portant, very grave and severe penalties have been affixed. These penalties, in most cases, are not only visited upon the master, but often become a charge upon the owner. His duty, then, not only to himself, but to his owners, demands of him some acquaintance with the provisions and requirements of these statutes.

The station which the ship-master holds, is one of great responsibility and confidence. To him is confided, in a great degree, not only the interests and fortunes of his employers, but the well-being and lives of his crew. From the nature of his situation, and the exposure of the property committed to his charge, he has been invested with great authority. But in proportion to his power, is his legal accountability. Nothing, then, concerns him more than to know what the extent of his authority is, and how far the law sustains him in its exercise.

The author has carefully endeavored to make this work not only as full and particular as possible upon the various duties and liabilities of the merchant and mariner, but also to make it, at the same time, in all respects, a safe and accurate guide. The principles here laid down, have, in almost every case, been drawn from sources of undoubted authority. Where a principle seemed of doubtful authority, or become in any way unsettled, it has generally been omitted. It seemed better that a chasm should be left in the chain of directions, than that uncertain and erroneous advice should be inserted.

F. W. S.

Boston, Jan. 1, 1840.

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GUIDE

TO

SHIP OWNERS AND MASTERS.

CHAPTER I.

OF THE TITLE TO SHIPS.

The bill of sale is the proper evidence of title to a ship. This is the muniment of title which the maritime courts of all nations look for, and in ordinary practice require.* In the admiralty courts a document of sale would seem to be considered *indispensably* necessary to convey the title.† It has, however, been decided in the common law courts of Massachusetts and New York, that a vessel may pass by delivery, the same as any other chattel, without any instrument in writing.‡

In the bill of sale, the register must be recited at length; as without it the vessel is incapable of being registered anew.§

*5 Rob. Adm. R. 155. †1 Mason, 139. ‡8 Pick. R. 89. 7 John. R. 308. § Act March 2d, 1803, See 3.

The mere neglect to transfer the register, upon the sale of the ship, does not defeat the sale, it only deprives her of the rights of an American vessel.*

To complete the title of the purchaser and make it perfect, possession of the vessel should accompany the bill of sale. This is where the vessel is in port and in a situation for possession to be delivered. If the buyer, under such circumstances neglects to take possession himself, but suffers the seller to remain in possession, and act as owner, and the seller should become bankrupt, the property would be liable to the creditors of the vendor without notice.

The same rule exists in the case of the mortgage of a ship. Possession must accompany the bill of sale.†

A bill of sale of a ship at sea gives the purchaser a perfect title, provided he uses all due diligence to take possession of her after her arrival. If he neglects to take such possession within a reasonable time, the presumption of law is that the sale was collusive and fraudulent, and the ship will be held liable for the debts of the vendor.‡

The vendee of a ship at sea, however, is not bound to follow her from port to port in order to take possession; but he may reasonably wait her return to the port where she belongs; and the sale

* 5 Mass. 42. † 6 Mass. 422. ‡ 9 Pick. 4.

will be good against creditors who shall attach her at any other place before her return.*

The mortgagee of a ship at sea must take possession, immediately on her arrival in port, in the same manner as is provided for the sale of a ship similarly situated. †

The buyer of a ship at sea takes subject to all incumbrances, and to all lawful contracts made by the master, respecting the employment and hypothecation of the ship prior to notice of the transfer. ‡

Sometimes vessels are sold by their masters, as unfit for service. A title derived through the master, by virtue of a sale by him, is good or not just as it may afterwards appear, whether or not the sale was justified by the circumstances. It follows, then, that the title thus acquired is of the lowest and most unstable description.

*18 Mass. Rep. 389. †15 Mass. Rep. 477.
‡9 Pick 4. Kent, Vol. 3. 133.

CHAPTER II.

REGISTRY, ENROLLMENT AND LICENSE OF SHIPS.

Of the Registry of Ships.

One of the first acts of the American Congress, after the adoption of the constitution, was to confer peculiar privileges upon ships *built* and *owned* by our own citizens. For this purpose, various acts for the Registry, Enrollment and License of vessels was passed, having for their object the encouragement of our own trade, navigation and ship-building, by granting peculiar or exclusive privileges of trade to the flag of the United States, and by prohibiting the communication of those immunities to the shipping and mariners of other countries.

No ships or vessels are absolutely *required* to be registered by our laws. But, if not registered, they lose the *privileges* and *benefits* of ships of the United States, and are deemed *foreign* ships or vessels.*

Ships and vessels found in the coasting trade or fisheries, without being *registered* or *licensed*, with domestic goods on board, must pay foreign tonnage duties; and if with *foreign goods* on board are liable to *forfeiture*.†

* Note by Story, Abbott, p. 32. † Act 1793, Ch. 52, Sec. 6.

Foreign ships are *prohibited* from carrying on the coasting trade from one port in the United States to another.*

The shipping which enters our ports may be divided into five classes :—

1. Ships which are entitled to be *registered;* which must be built within the United States and wholly owned by citizens, and employed in *foreign trade.*

2. Ships which are entitled to be *enrolled* and *licensed*, and which are built and owned in like manner, and are employed in the coasting trade and Fisheries.

Ships thus *registered*, and *enrolled* and *licensed* are alone denominated and deemed "vessels of the United States entitled to the benefits and privileges appertaining to such ships," and they continue to enjoy the privileges of ships of the United States no longer than they continue to be *wholly owned*, and *commanded* by a citizen or citizens.†

3. Ships built in the United States, but owned wholly or partly by foreigners, which are entitled to be recorded. Recorded vessels pay a lower tonnage duty than foreign vessels.

4. Ships built out of the United States, but owned by citizens, which are entitled to a *certificate of ownership.*

* Act 1817. Ch. 204.

† Act 1792, ch. 45. — Act 1793, ch. 52, Sec. 1 & 2.

5. Ships *built* out of the United States and *owned* by foreigners, which are deemed *alien vessels* to all intents and purposes.*

Vessels engaged in the whale fishery must be enrolled and licensed to entitle them to be deemed United States ships.†

No vessel is entitled to be registered, or if registered to the benefits thereof, if owned in whole or in part by any citizen who usually resides in a foreign country, during such residence, unless such citizen be in the capacity of a Consul of the United States, or an agent for, and a partner in some house of trade, or copartnership consisting of citizens wholly carrying on trade within the said States.

Where registered. The ship must be registered by the Collector of the port where she belongs, or in which she may happen to be, and founded on the oath of one of the owners, stating the time and place where she was built, who are the owners and master, and that they are citizens of the United States.

Previous to the registry, a certificate of survey must be produced, and security given that the certificate of such Registry shall be solely used for the ship, and shall not be sold, lent, or otherwise disposed of.

In case a new ship is to be registered, it is neces-

* Notes on Abbot by Story, p. 29. † 3. Sumner, * * *

sary to produce a certificate under the hand of the master carpenter, under whose direction she was built, specifying the place where, and the time when, and the person for whom built, and describing her built, number of decks, and masts, length, breadth, depth, tonnage, and such other circumstances as are usually descriptive of the identity of a ship.

Such a certificate authorizes the removal of a new ship in ballast from the district where she is built to another district, in the same or an adjoining State, to where the owner resides.*

If the vessel, or any interest therein, be sold to any foreigner, and the vessel be within the United States, the certificate of the registry must, within seven days after the sale be given up to the collector of the district, and if the sale is made when the vessel is abroad, or at sea, it must be delivered up within eight days after the master's arrival in the United States.†

When a vessel is *sold*, in whole, or in part, to a citizen of the United States, or altered in *form* or *burthen*, she must be registered *anew*, and her former certificate of registry *delivered up*, otherwise she will cease to be deemed a vessel of the United States, or entitled to any of the privileges of one.

Upon every change of master, the owner must report such change to the collector, and have a

* Act 1792, ch. 45, Sec. 8. † Act 31, Dec. 1792, Sec. 7 & 16.

memorandum of such change endorsed upon the certificate of registry.

If a registered ship is transfered to a foreigner, by way of trust, confidence or otherwise, the sale or transfer must be reported to the Custom House and the certificate of registry given up, otherwise the ship will be forfeited.

But if the ship be owned in parts, the shares of the owners, who are conusant of the sale, or transfer, only, are forfeited.

Oath taken, when register is granted. The oath that is taken when a ship's register is granted, relates entirely to the legal title, and does not require the applicant, who holds the bill of sale, to disclose the name or names of those who have an equitable interest only in the property. The denial that any foreigner is directly or indirectly interested therein, is sufficient.

Hence a mortgagee may take out a register in his own name, notwithstanding the equity of the mortgagor.*

If there be two or more owners, the oath may be taken by one of them, but the remaining, who are resident within the United States, must transmit to the collector, who grants the certificate of registry, a like oath or affirmation within ninety days after the same is granted, or the certificate of registry is forfeited and void. The oath may be

*1 Mason, R. 360.

taken before the same, or any other collector, or a Judge of the Supreme or District Court of the United States, or of a superior Court of Original Jurisdiction in any of the States.

When a ship is registered in a collection district other than that to which she belongs, the certificate of registry must be given up to the collector of the port to which she belongs, and a new certificate taken out upon her first arrival within the last named district. If the certificate be not so delivered up, it becomes void, and the owner and master incur the penalty of $100.

When the register of a ship is given up to the collector of the port where it was granted, the bond given at the time of granting it is to be cancelled. If given up to any other collector, he is to give a receipt, acknowledging the delivery; and upon this receipt being produced to the collector, who granted the register, he is to cancel the bond.*

The name of every registered ship, and the port to which she belongs, must be painted on her stern, on a black ground, in white letters of not less than three inches in length, under the penalty of 50 dollars.†

Of the Enrollment and License of Ships.

Vessels not employed in the Foreign Trade must be *enrolled and licensed*, to entitle them to the

*Act 1792, ch. 45, Sec. 18. † Ibid, ch. 35, Sec. 3.

privileges of vessels of the United States. For that purpose they must possess the same qualifications, and the same requisites must be complied with, as are made necessary for registering ships; and the ships enrolled, with the master and owner, are subject to the same regulations as are in those respects provided for registered vessels.

Any vessel may be enrolled and licensed, that may be registered, upon the registry being given up; and any vessel that may be enrolled may be registered upon the enrollment and license being given up.*

If the vessel be under *twenty* tons, she need not be *enrolled* and *licensed;* but it will be sufficient if she has a *license only.*†

Enrollment, however, is not of itself sufficient for any ship of a greater tonnage; but the ship must moreover have a license for the coasting trade or fisheries in force at the time; otherwise she loses her American privileges.‡

If a vessel, enrolled and licensed, proceed on a foreign voyage without first surrendering up her enrollment and license, and being duly registered, she shall, with her cargo, imported into the United States, be subject to forfeiture.§

Vessels, enrolled and licensed, must have their name painted on their stern in the same manner as is provided for registered vessels.

* Act 18th Feb. 1793, ch. 52, sec. 3. † Ibid. sec. 12.
‡ Ibid. sec. 1 and 2. § Ibid. sec. 6.

No license granted to any vessel is in force any longer than she is owned as, and is of the description set forth in her license, or for carrying on any other business or employment than that for which she is specially licensed.

The license must be given up to the collector who granted it within three days after it expires, provided the vessel be then in port, but if she be then absent, within three days after her next arrival within the district afterwards.

In order to obtain a license for carrying on the coasting trade or fisheries, the owner or ship's husband, and master, must give security to the United States that the vessel be not employed in any trade whereby the revenue of the United States may be defrauded.

CHAPTER III.

DOCUMENTS NECESSARY FOR AMERICAN VESSELS.

The Passport. This is a permission from the government for the vessel to proceed on the voyage proposed, and contains the name and residence of the master, the name and description of the vessel, number of crew, and guns mounted. This document is only necessary for vessels going to Europe.

The Sea Letter, specifies the nature and quantity of the cargo, and place of destination. It is in the French, Spanish, English, and Dutch languages, and is only necessary for vessels bound around cape Horn and the cape of Good Hope.*

The Register or Proof of Property, which shows the names and residences of the owners,

* MARTIN VAN BUREN, President of the United States of America, to all who see these presents, greeting:

Be it known, that leave and permission are hereby given to master or commander of the called of the burthen of tons or thereabouts, lying at present in the port of bound for to depart and proceed with his said on his said voyage, such having been visited, and the said having made oath before the proper officer, that the said belongs to one or more of the citizens of the United States of America, and to him or them only.—

In witness whereof I have subscribed my name to these presents and affixed the seal of the United States of America thereto, and

where the vessel was built, and when, and a particular description of the vessel. This must be returned to the custom house upon the return of the vessel.

In peace this is necessary to show that the ship really belongs to a neutral state. If she appear to either belligerent to have been built in an enemy's country, proof is generally required, that she was purchased by the neutral before, or captured and

caused the same to be countersigned by at the day of in the year

By the President.

Most serene, serene, puissant, puissant, high, illustrious, noble, honorable, venerable, wise and prudent Lords, Emperors, Kings, Republics, Princes, Dukes, Earls, Barons, Burgomasters, Schepens, Counselors, as also Judges, Officers, Justiciaries and Regents of all the good cities and places, whether ecclesiastical or secular, who shall see these presents or hear them read. We make known that the master of has declared upon oath that the vessel called the of the burthen of about tons, which he at present navigates, is of the United States of America, and that no subjects of the present belligerent powers have any part or portion therein, directly or indirectly, so may God Almighty help him. And as we wish to see the said master prosper in his lawful affairs, our prayer is to all the before-mentioned, and to each of them separately, where the said master shall arrive with his said vessel and cargo, that they may please to receive the said master with goodness, and to treat him in a becoming manner, permitting him upon the usual tolls and expenses in passing and repassing, to pass, navigate, and frequent the ports, passes and territories, to the end to transact his business where and in what manner he shall judge proper. Whereof we shall be willingly indebted.

In witness and for cause whereof, we affix hereto the seal of

legally condemned since the declaration of war; and in the latter case, the bill of sale properly authenticated, ought to be produced. Even *Habner* admits that these proofs are so essential to every neutral vessel for the prevention of frauds, that those which sail without them will have no reason to complain if they are interrupted in their voyages, and their neutrality disputed.

The List of Crew contains the names, ages, quality, place of residence, and place of birth, of every person of the ship's company, &c. This must be returned with the reporting officer's certificate of the number of men still on board.

This document is of great use in ascertaining a ship's neutrality. It must naturally excite a violent suspicion, if a majority of the crew be found to consist of foreigners; still more if natives of the enemy's country.

The Charter Party, when one is given. This instrument serves to authenticate many of the facts on which the proof of the ship's neutrality rests.

The Bill of Lading, by which the captain acknowledges the receipt of the goods specified therein, and promises to deliver them to the consignee or his order. Of this there are usually several duplicates: of which one is delivered to the captain, one kept by the shipper of the goods, and one transmitted to the consignee. This instrument being only the evidence of a private transaction between the owner of the goods and the captain,

does not carry with it the same degree of authenticity as the charter party.

The Invoice, which contains the particulars and prices of each parcel of goods, with the amount of the freight, duties, and other charges thereon, which are usually transmitted from the shippers to their factors or consignees. These invoices prove by whom the goods were shipped and to whom consigned. They carry with them, however, but little authenticity, being easily fabricated, where fraud is intended.

The Log Book, or Ship's Journal, which contains an accurate account of the ship's course, with a short history of every occurrence during the voyage. If this be faithfully kept, it will throw great light on the question of neutrality. If it be in any respect fabricated, this may in general be easily detected.

The Bill of Health, which is a certificate, properly authenticated, that the ship comes from a place where no contagious distemper prevails, and that none of the crew, at the time of her departure, were infected with any such distemper.

The General Clearance contains the name of the captain, vessel's name, number of men on board, number of guns, and description of cargo, with permission to proceed to port of destination.

The Clearing Manifest, containing the description of cargo, and values, to be left in the custom house; and if bound to France, Sweden, Brazil

and Portugal, there must be a duplicate manifest, certified by the foreign consul, to be kept on board.

On Entering.

Manifest, containing a statement of cargo, and description of packages and contents, names of shippers and consignees, residences of consignees, and ports of destination; and *list of passengers* and *remaining sea stores.* List of *seamen.*

List of Passengers, showing names, occupations, age, sex, and whether citizens of the United States — sworn to by the captain — for the custom house, and one for the Mayor's office.

CHAPTER IV.

FOREIGN TRADE.

Regulations concerning the Clearance and Arrival of Vessels, Manifests, and the Entry and Delivery of their Cargoes.

Passport. Masters of unregistered vessels, owned by citizens of the United States, and sailing with a Sea Letter, may obtain a passport from the collector of the port from whence they depart, by paying therefor $10.*

Clearance. The master of any vessel bound on a foreign voyage must, before a clearance will be granted him, deliver to the collector of the customs a list containing the names, places of birth, residence, and a description of the persons who compose his ship's company. The master must then make oath, that the list contains the names of his crew, as well as their places of residence as far as he can ascertain them: after which the collector must deliver to the master a certified copy of said list, and the master must, moreover, enter into bond with sufficient security, in the sum of $400, that he will exhibit the above certified copy of the list, to the first boarding officer, at the first port in the United States to which he may arrive on his return thereto, and at the same time produce the

* Act, June 1, 1796, sec. 2.

persons named therein to the boarding officer, unless the same have been discharged in a foreign port with the consent of the consul, vice consul, commercial agent, or vice commercial agent, expressed in writing, under his hand, and official seal; or that they have died or absconded, or been forcibly impressed into other service.

Arrival at Foreign Port. The master, or commander, of every vessel, belonging to citizens of the United States, on his arrival at a foreign port, must deposit his *Register*, *Sea Letter*, and *Mediterranean Passport*, (if he have one,) with the consul, vice consul, commercial agent, or vice commercial agent — if any such there be at said port — to be retained by him until he has obtained a clearance. The master who refuses to surrender such papers as above, is liable in a fine of $500.

Manifest of Passengers. Masters of vessels, arriving in the United States, from foreign ports, must deliver and report to the collector, at the same time that they deliver manifests of their cargoes, or if they have no cargoes, then at the same time they report, or enter their vessels, a list, or manifest of the passengers, designating particularly, the age, sex, and occupation of the passengers, the country to which they severally belong, and that of which it is their intention to become subjects or citizens. The neglect, or refusal of the master to report, as aforesaid, subjects him to a penalty of $500.*

* Act, 2d March, 1819.

Time for Unlading Vessels. By the Act of March 3, 1821, the time for unlading vessels of 300 tons burthen and upwards, arriving from a foreign port, is extended to twenty days from the port of arrival, (Sundays excepted.)

The hours within which vessels from foreign ports may unlade, is from the rising to the setting of the sun, and the cargo cannot be unladen and delivered before, or after that time, except by special license, or permit, from the collector of the port.

Ship Stores. Masters of vessels, in making out the manifests of their cargoes, are bound to specify particularly all those articles which they deem to be exempt from duty, as being the *sea stores* of their vessels, and will be called upon to declare upon oath, "*that the articles so specified as sea stores are truly such, and are not intended by way of merchandise or for sale.* If it appears to the collector that the quantity designated as sea stores is not excessive, then they are free from duty. But if the collector, to whom the report and manifest is to be made, deems that the quantity designated as sea stores is excessive, and levies a duty on such excess, the master must pay the same forthwith.

If any other, or greater quantity of articles are found on board of any such ship or vessel, than the master has specified in his manifest, they are by law forfeited to the government, and the master liable to pay treble their amount.

If the master *land* any of the sea stores of the vessel without first obtaining a permit from the

Collector, he also forfeits treble their value, as well as the goods.*

Smuggling. The master, and all other persons, knowingly assisting in unlading, removing, or secreting goods, contrary to the above, are liable to forfeit and pay, each, and severally, the sum of $400, and to be disabled from holding any office of trust or profit, under the United States, for a term not exceeding seven years.

It is made the duty, also, of the collector to advertise the names of all such persons, in some public print, within twenty days after their conviction.

Passport. Vessels bound on a foreign voyage, are required to obtain a passport, as provided by law, for which the master must pay $10. On receiving the passport the master must give bonds in the penalty of two thousand dollars, conditioned that the said passport shall not be used for the protection of any other ship or vessel than the one described in the same; and in case of the loss or sale of the vessel, the same shall be delivered up in *three months* to the collector from whom it was received, if the loss or sale take place within the *United States;* or within *six months* if the sale or loss take place any where this side of the *cape of Good Hope;* and within *eighteen months* if at a more distant place.

To depart on a foreign voyage without such passport subjects the master to a fine of $200.

* Act, 2d March, 1799, sec. 45.

Vessels owned in the United States, and bound to a foreign port, other than a port in America, are subject to a charge of four dollars, for each and every voyage, to be paid at the time of clearing outward. If, however, the vessel has cleared for a foreign port from a port in America, out of the United States, then this charge must be paid by the master on his arrival from such foreign port in any port in the United States.

Account of Seamen. Masters of vessels, arriving from foreign ports, must render a true account to the collector of all the seamen employed on board during the voyage.

American vessels from abroad, to become entitled to be placed upon the most favorable footing, must have the captain, and all the mates Americans; and also two-thirds of all other persons making a part of their crew, Americans, "or persons not the subjects of any foreign prince or state." In this latter item are included the seamen, the cook, the apprentices, the boys and all other persons, (not including the captain and mates,) doing duty on board. They must also have an American *register.*

Importation of Goods. No merchandise can be imported in any vessel belonging, in whole, or in part, to a citizen or inhabitant of the United States, unless the master have on board a *manifest* in writing, signed by such master or other person having the command, containing the name of the port where such merchandise was received, and the

port where consigned or destined to, within the United States; particularly noting the merchandise destined for each port respectively, and the name, description and built of the vessel, with the marks and numbers on each package, with the name of the owner and master; and every package must be truly and particularly described, as well as all goods stowed loose — to whom consigned, according to the bills of lading; or if to order; with the names of all passengers, distinguishing whether cabin or steerage passengers, or both, with their baggage, and an account of all remaining sea stores.*

Manifests. It is the duty of the masters of American vessels arriving from foreign ports, to have *their manifests made out* at the time of leaving such ports. The time of lading is the most proper for making out a manifest of the cargo. The master is liable to incur the penalty of the law, if he does not have his manifest in readiness to exhibit to any custom house officer who may board him within four leagues of the coast. The master is not allowed, by law, to make out his manifest, *after the arrival of his vessel within four leagues of the coast.*†

Copy of Manifest. The master must be prepared not only to exhibit to such officer, on his boarding him, any where within a league of the coast, his original manifest, but must deliver to

* Act, 2d March, 1799, sec. 23. † Ibid.

him *a copy thereof.* The officer certifies on the original, the day and year the same was produced; the copy is compared with the original, and there is certified by such officer, on the back of the same, the day and year such copy was given to him. The original manifest is delivered afterwards by the master to the collector.

The master must also provide another copy for the officer of the customs who first comes on board after the vessel has arrived in port, who also certifies on the original and forwards his copy to the collector. If the original be shown without such certificates, the master must swear that no copies have been called for by the other officers. It is sufficient to show the original, with the indorsements, to other officers.*

Any vessel so laden, within four leagues of the coast, or within the limits of any district, unloading goods without authority from proper officers, the master and mate forfeit one thousand dollars for each offence, and the goods are forfeited, except in case of accident, necessity, or stress of weather: which must be made known and proved under oath by the master, mate, and one other officer, or mariner.†

The penalty on masters for not exhibiting the manifest, and delivering a copy thereof, on demand from the proper officer; or for not informing such

*Act, 2d March 1799, Sec. 23. †Ibid. Sec. 27.

officer of the *true destination* of such vessel is $500 for each offence.*

When Cargo to be delivered in different Districts. If merchandise imported is destined to be delivered in different districts or ports, the said merchandise must be inserted in successive order in the manifest; and all Spirits, Wines and Teas, being the whole or any part of the cargo, must be inserted in like order, distinguishing the port where destined, and the kind, quantities and qualities thereof.

If goods be consigned by the manifest, to persons residing in different ports of the United States, the master may land at the first port, such goods as are consigned to persons at the first port, and he may at his own pleasure land either the whole, or a part, or none of the rest, until they reach the ports to which they are destined. The manifest must specify the articles destined to each port. The master must give a bond for the landing and securing the duties on whatever goods he chooses to keep on board his vessel, for the purpose of carrying forward to another port.

Such vessels may take on board any other articles to be landed in any other port in the United States; for which goods they must have the manifest of a coaster, and clear out as such. They must however pay tonnage duties in each port.

Certificate. If the vessel remain in port more than forty-eight hours, the collector furnishes the

*Act, 2d March 1799, Sec. 26.

master with a copy of his report, and a certificate, showing on what part of the cargo the duties have been paid or secured. The copy of the report the master must produce to the collector of the port where bound, together with the certificates of the collector of other districts, when goods have been landed within twenty-four hours after her arrival, (except in the State of Georgia where forty-eight hours are allowed,) under penalty of $500.— The bond is cancelled by producing from the collector of such district a certificate, within six months, of the due entry and delivery of such merchandise, in such district, or upon due proof that such entry and delivery were unavoidably prevented by loss or otherwise.*

Spirits, Wines and Teas. The master must, also, apply to the surveyor or inspector of the port for a copy of the report similar to the report of the collector, relating to distilled Spirits, Wines or Teas, when there are any on board to be delivered in different districts.

The want of such report from the surveyor or inspector subjects the Spirits, Wines and Teas to forfeiture and a penalty upon the master of $500.†

American vessels arriving from foreign ports may put on their manifests either the whole or a part of their cargo, *as destined for a foreign port.* Such parts as are thus destined they will not be obliged to land in the United States, nor to secure the du-

* Act 2d March, 1799, Sec. 33. †Ibid. 35.

ties thereon ; but bonds must be given for the landing them abroad, the same as debenture goods.*

Letters. Masters of American vessels are required to deposit their letters at the post office previous to entry at the custom house.†

They are also required, under a penalty of $100, to declare on oath whether any seamen have been impressed in the course of the voyage, and the course they took thereupon.

For all goods not included in the manifest, or imported without a manifest, the master forfeits a sum equal to their value ; and all merchandise not included in such manifest, belonging or consigned to the master, mate, officer or crew, is forfeited, unless it is made to appear to the satisfaction of the collector, naval officer, and surveyor, or the major part of them, or to a court on trial, that no part was unshipped, except what was mentioned in the report of the master, or that the manifest has been lost, or mislaid, without fraud, or defaced by accident, or incorrect by mistake.‡

Neglect to Enter. When a vessel has arrived within any district in the United States, from any foreign port, the master must not depart, or attempt to depart from the same, (unless to some more interior port, or by stress of weather, or pursuit of enemies,) before report and entry with the collec-

* Act 2d March, 1799, Sec. 32.
† Act 3d March, 1825, Sec. 17.
‡ Act 2d March, 1799, Sec. 23.

tor. If the master neglects to enter as aforesaid he forfeits $400.

Masters of vessels arriving from foreign ports must report their arrival within twenty-four hours thereafter to the collector of the port, (if the hours of business at the office of the chief officer of the customs at such port will permit;) and within forty-eight hours after he must make a further report in writing to the collector; which report must be in the form, and contain all the particulars, required to be inserted in the manifest.*

If the master or commander neglects to make such report he forfeits the sum of $100.

Masters of vessels, employed by any prince, or state, as public packets, and forbidden by law to be engaged in the transportation of goods in the way of trade, are not required to make such report or entry. †

Every master of a vessel arriving from any foreign port, or place, having on board Spirits, Wines or Teas, intended to be transported from one to another port, must obtain from the inspector of the customs for that port, a certificate of the quantity and particulars of the Spirits, Wines and Teas discharged at that port, and also the quantity and particulars of those that are to be carried forward; and the master is bound to produce his certificate at the next port he enters within twenty-four hours after such entry, and deliver the same to the col-

* Act 2d March, 1799, Sec. 30. † Ibid. Sec. 31.

lector, or inspector of the port; and in case he neglects so to do he forfeits the sum of $500.

The master forfeits $500 in case any package reported in the manifest be not found on board, or in case there be any disagreement between the merchandise on board and the report of the same; unless he can prove to the satisfaction of the collector and naval officer of the port, or when on trial, to the satisfaction of the court, that no part of the merchandise of said ship has been unladen since it was taken on board, except as specified in the manifest, or that the disagreement is by accident or mistake.

In every such case the master must make a post entry of any and all merchandise omitted to be reported in such manifest. No permit can be granted to unlade any such merchandise so omitted, before such post entry has been made.

The master or any other person having command of any vessel, having distilled Spirits or Wines on board, within forty-eight hours after arrival, must make a report in writing to the surveyor or inspector of the revenue of the port, under the penalty of $500, and the loss of the spirits so omitted.

Goods remaining on board after the expiration of fifteen working days, (or twenty days where the vessel is of more than 300 tons burthen, and from a foreign port,) from the day of the report of the master to the collector, made upon his arrival, (other than those reported for some other district,

or some foreign port,) the inspector must take possession of.

Regulation for clearing Vessels.

The master of any vessel bound to a foreign port, must deliver to the collector a manifest of all the cargo on board, and the value thereof, by him subscribed, and swear or affirm to the truth thereof. Thereupon the collector grants a clearance for such vessel and her cargo, without specifying the particulars in such clearance unless required by the master. If any vessel depart on her foreign voyage without delivering such manifest and obtaining a clearance, the master forfeits $500.*

Before a clearance can be granted for any vessel bound to a foreign port, the owners, shippers or consignees of the cargo on board, must deliver to the collector manifests of the cargo, or the parts thereof shipped by them respectively, and verify the same by oath or affirmation.

Such manifests might specify the kind and quantities of the articles shipped by them respectively, and the value of the total quantity of each kind of article. They must also, together with the master, before a clearance can be granted, state upon oath or affirmation to the collector, the foreign place or county in which such cargo is truly intended to be landed.†

*Act 2d March, 1799, sec. 3. See form of report in appendix, (A.)

† Act 10th Feb. 1820, Sec. 11.

CHAPTER V.

REGULATIONS CONCERNING VESSELS IN THE COASTING TRADE.

Vessels owned by citizens of the United States, and engaged in the coasting trade, must be *enrolled and licensed* for that trade, or in case they are not so enrolled and licensed, pay a tonnage duty of fifty cents per ton, to be exacted once a year. In this trade it is required in all cases, that the master be an American citizen, and if such vessel be carrying on trade beyond the limits of their own and neighboring states, then three-fourths of the crew, at least, must be "American citizens, or persons not the subjects of any foreign power or state."

Change of Master. When the master of a licensed vessel is changed, such change must be reported to the collector of the port where the change is made; and if there be none, then at the port where the vessel may next arrive. The collector upon proof of the citizenship of the new master, and upon his taking an oath not to defraud the revenue, endorses the change upon the license.*

Any revenue officer may require the enrollment or license to be produced at any time; and the re-

*Act 18th Feb. 1793, Sec. 12.

fusal to exhibit the same, subjects the master to a fine of $100.*

Vessels without license forfeited, for what. Any vessel engaged in the coasting trade, and sailing without a license, having on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, she, together with her tackle, apparel, furniture and lading, found on board, are forfeited.

When license expires at sea. But if a licensed vessel be at sea at the expiration of the time for which the license was given, and the master make oath that such was the case; and also, within forty-eight hours after the arrival, deliver to the collector of the district in which he first arrives, the license which has expired, then the vessel is not forfeited nor liable to pay fees and tonnage.†

Alien vessels cannot sail coastwise, except. No goods can be transported, under a penalty of forfeiture of the same, from one to another port of the United States in a vessel belonging wholly or in part to a subject of any foreign power; but such vessel may sail from one to another such port, carrying such goods only as were imported in her from some foreign port, and which have not been unladen.†

Registered vessels may be enrolled upon the registry being given up, and so enrolled vessels may in like manner be registered.

*Act 18th Feb. 1793, Sec. 13. † Ibid. Sec. 6.
‡ Act 1st March, 1817, Sec. 4.

Change of Registry to Enrollment. When any vessel is in a district other than that to which she belongs, and the master is desirous to change her registry to an enrollment, or her enrollment to a registry, he can apply to, and obtain the desired change by giving bonds as required by law.—The master negotiating the exchange must, however, within ten days after her arrival in the port to which she belongs, surrender such register or enrollment to the collector to be by him cancelled. If the master neglects to deliver such register within the time specified, he forfeits $100.*

Bond when license is granted. In order to the licensing of any vessel for carrying on the coasting trade, or fisheries, the husband, together with the master, with one or more sureties, to the satisfaction of the Collector, must become bound to pay to the United States, if she be of the burthen of five tons and less than twenty tons, the sum of $100; if twenty tons, and not exceeding thirty tons, the sum of $200; and if above thirty tons, and not exceeding sixty tons, the sum of five hundred dollars; and if above sixty tons the sum of one thousand dollars—in case it appears within two years from the date of the bond, that she has been employed in trade whereby the revenue of the United States has been defrauded, during the time the license remained in force; and the master must also wear that he is an American citizen, and that

*Act 18th Feb. 1829, Sec. 3.

the license shall not be used for any other vessel, or any other employment than for which it is specially granted, or in any trade whereby the revenue may be defrauded; and if the vessel be less than twenty tons burthen, her husband must swear that she belongs wholly to a citizen or citizens of the United States; whereupon the collector of the district whereto such vessel may belong (the duty of six cents per ton being first paid) must grant a license in the form directed by law, for carrying on the coasting trade, whale fishery, cod fishery, or mackerel fishery.*

Steamboats intended to ply only in a river or bay of the United States, may be enrolled and licensed and no oath is required that she be wholly owned by a citizen or citizens of the United States.

Change of Master must be reported. When the master of any licensed vessel is changed, the new master, or in case of his absence, an owner must report such change to the collector residing at the port where the same may happen, if there be one, otherwise to the collector residing at any port where such vessel may arrive, who, upon the oath of such master, or in case of his absence, of an owner, that he is a citizen of the United States, and that he will not, while such license is in force, be employed in any manner whereby the revenue may be defrauded, shall indorse such change on the license with the name of the new master.

*Act 18th Feb. 1793, Sec. 4.

Without such notice of change and endorsement thereon, the vessel becomes liable to be assessed upon as a registered vessel and the new master to a fine of ten dollars.

Master must report account of Seamen. Before any vesssel, whose enrollment or license for carrying on the coasting trade has expired, can get a new enrollment, the master must render a true account of the number of seamen, and the time they have severally been employed on board during the continuance of the expired license, and must pay to the collector twenty cents per month for every month such seamen have been so severally employed, which sum the master may detain from the wages of such seamen.

If the master renders a false account, he forfeits, and is liable to pay, the sum of $100.*

Surrender of License. The license granted to any vessel must be given up to the Collector of the district who granted the same, within three days after the expiration of the time for which it was granted, in case she be then within the district; or, if she be absent at that time, within three days from her first arrival within the district afterwards; or if she be sold out of the district, within three days after the arrival of the master within *any* district, to the Collector of such district, taking his certificate therefor.

If the master neglects or refuses to deliver up

*Act 16th July, 1798, Sec. 2.

the license as above, he forfeits $50. The master, however, is not liable to the penalty if he has previously given the same up to some other Collector, or if it be lost, mislaid, or destroyed.

May trade coastwise, without entering or clearing.

Licensed coasters of twenty tons burthen and upwards, may carry on such trade within the limits of either the three great districts, without being obliged to clear or enter at the Custom House, provided they have *not* on board

Distilled spirits in casks exceeding		500 galls.
Wine	in do. do.	250 do.
Wine in bottles	do.	100 doz.
Sugar in casks or boxes	do.	3000 lbs.
Tea in chests or boxes	do.	500 do.
Coffee in casks or bags	do.	1000 do.

Of foreign goods, in packages, as imported, exceeding $400, or goods of foreign growth or manufacture, or both, whose aggregate value exceeds $800.

Must make a Report. A master of a vessel laden with spirits, &c., as above, must make a report or manifest of the cargo, taken on board at the port of lading, and have the same certified by the Collector; and this manifest, previously to his unlading any part of the cargo, must be delivered to the Collector of the port of unlading, if any such resides within five miles of the same; if not, the master may proceed to discharge his cargo, but must de-

liver to the collector or surveyor of the next port, within twenty-four hours after his arrival at the same, the said manifest, and make oath to the truth of the same.

The Great Coasting Districts. For the more convenient regulation of the coasting trade, the sea coast and navigable rivers of the United States are divided into three great districts; the first includes all the districts on the sea coast and navigable rivers, between the eastern rivers of the United States and the southern limits of Georgia; the second, all the districts on the sea coast and navigable rivers, between the river Perdido and the western limits of the United States; and the third, all the ports, harbors, sea coast, and navigable rivers between the southern limits of Georgia and the river Perdido.*

Every vessel, of the burthen of twenty tons or upwards, licensed to trade between the different districts of the United States, may carry on such trade between the districts included within the great districts respectively, and between a state in one and an adjoining state in another great district, in manner and subject only to the regulations that are now by law required to be observed by such vessels in trading from one district to another in the same state, or from a district in one state to a district in the next adjoining state.†

Every vessel of the burthen of twenty tons or

* Act, March 2, 1819, Sec. 1 — May 7, 1822, Sec. 11.

† Ibid. Sec. 2.

upwards, licensed so to trade, must, in trading from one to another great district, other than between a state in one and an adjoining state in another great district, conform to and observe the regulations that are required to be observed by such vessels in trading from a district in one state to a district in any other than an adjoining state.

Manifest of the Cargo. The master of any vessel licensed for carrying on the coasting trade, bound from one great district in the United States to another great district, must make and deliver to the collector of the port from which he is to depart, duplicate manifests of all the cargo on board, or, if there be no cargo, he must so certify; and if there be any distilled spirits or goods of foreign growth or manufacture on board, other than sea stores, the master must specify in such manifest, particularly, the marks and numbers of every box, bag, cask, chest or package, containing the same, with the name and place of residence of every shipper and consignee of such distilled spirits or goods of foreign growth or manufacture, and the quantity shipped by and to each, and swear, *that such goods of foreign growth or manufacture, were, to the best of his knowledge and belief, legally imported, and the duties thereupon paid or secured*, or if spirits distilled within the United States, *that the duties thereupon have been duly paid or secured.* If the master depart from the port of lading, with distilled spirits or goods of foreign growth or manufacture

on board, without complying with the several things enjoined as above, he forfeits one hundred dollars, and if he depart without any cargo, or with a cargo of goods of the growth or manufacture of the United States only, and neglects to deliver to the collector of the port the manifests as above, he forfeits *fifty dollars.**

The master of any vessel, laden as above, at the port of arrival and delivery, must deliver to the collector or surveyor of the port, within twenty-four hours after arrival, if such reside within five miles, and if at a greater distance, within forty-eight hours next after his arrival, and previous to the unlading of any of the goods brought in such vessel, the manifest of the cargo, certified by the collector or surveyor of the district from whence she last sailed. If a part of the distilled spirits, or goods of foreign growth or manufacture are to be landed, the master must get the collector or surveyor of the port where the same is landed, to certify the same upon the back of the manifest, specifying the articles to be landed. If the master neglect to comply with the above stipulations, he forfeits $100, — and if he land the distilled spirits, or goods of foreign growth or manufacture, without the certificate and permit of the collector or surveyor as above, the same are forfeited; and if the same amount to eight hundred dollars, the vessel with her tackle, apparel, and furniture are forfeited.†

* Act 18th Feb. 1793, sec. 17. † Ibid.

The master of a coasting vessel is, at all times, bound to have a manifest of the cargo that is laden on board, whether it is of a nature to require him to *enter* and *clear* or not; and on failure thereof, if the lading of such vessel consists only of goods, the produce and manufacture of the United States, (distilled spirits excepted) he is subject to a fine of $20. If there be distilled spirits, or goods, wares, or merchandise of foreign growth or manufacture, he is subject to a fine of $40; if he refuses to inform any officer of the custom from whence such vessel last sailed, and how long she has been in port, he is subject to a fine of $100; and if any of the goods laden on board such vessel, belonging to the master, owner, or mariner, be of foreign growth or manufacture, or spirits distilled within the United States, so much of the same as are found on board, not included in the manifest, are forfeited.

If any goods of foreign growth or manufacture be found on board a coasting vessel, on which the duties have not been paid or secured, they are forfeited.*

Port of Necessity. Upon putting into a port, other than the port of destination, the master must, within twenty-four hours after arrival, report to an officer of the customs, if any reside there, the arrival of the vessel, the names of the places he came from, and where bound, with an account of his cargo. Penalty for neglect, $20.†

* *Act* 18th Feb. 1793, sec. 18. † Ibid sec. 22.

Fishing Vessels. If vessels, licensed for the fisheries, are found within three leagues of the coast with foreign goods on board exceeding $500 in value, without a permit, they are liable to seizure, with the foreign goods.

Vessel bound to a port within the same or an adjoining State. Where licensed vessels, bound to a district in the same or an adjoining State have on board goods of domestic produce or manufacture only, or,

Distilled spirits not more than		500 galls.
Wine in casks	" " "	250 "
Wine in bottles	" " "	100 dozen
Sugar in casks or boxes	"	3000 lbs.
Tea in chests or boxes	"	500 "
Coffee in casks or bags	"	1000 "

or foreign merchandise in packages of not more than $400 in value, or goods of foreign growth or manufacture, or of both, whose aggregate value shall not be more than $800, the master need not deliver a manifest thereof or obtain a permit previous to her departure, or on her arrival make any report; but such master must be provided with a manifest, by him subscribed, of the lading which was on board at the time of his departure from the district from which she last sailed; and if the same or any part consists of distilled spirits, or goods of foreign growth or manufacture, with the marks and numbers of each cask, bag, box, chest, or package containing the same, with the name of the shipper

or consignee of each, such manifest must be by him exhibited, for the inspection of any officer of the revenue, when thereunto required. He must also inform such officer from whence such vessel last sailed, and how long she has been in port. If the master be not provided, on his arrival, with a manifest and exhibit the same when required, if the lading consists wholly of goods the produce or manufacture of the United States, (distilled spirits excepted,) he forfeits $20; or if there be distilled spirits or goods of foreign growth or manufacture on board, excepting sea stores, he forfeits $40; or if he refuse to answer the interrogatories truly, he forfeits $100.*

If any of the goods, not included in the manifest, are of foreign growth or manufacture, or of spirits distilled within the United States, so much thereof are forfeited to the United States.†

Loss of Manifest. If the master of a licensed coasting vessel, as above, has mislaid or lost the certified manifest before mentioned, or the permit that was given therefor, he cannot land the cargo laden on board until bonds be given to secure the payment of the duty upon all such parts of the cargo as are of foreign growth or manufacture, or of spirits distilled within six months, in the same manner as if they were imported from a foreign country. Such bond is cancelled by the master's either recovering the lost manifest, or by procu-

* Act 18th Feb. 1793, Sec. 18. † Ibid. Sec. 18.

ring a certificate from the collector of the port from whence the cargo was shipped, that such goods were legally exported in such vessel.*

Alien vessels. The master of a foreign vessel, bound from a district in the United States to any other district within the same, must, previous to her departure, deliver to the collector duplicate manifests of the lading on board, or if there be none, he must so declare; and to the truth of such manifests, or declaration, he must swear, or affirm; and also, obtain a permit from the collector authorizing him to proceed to his place of destination. The master of every such vessel on his arrival within any district from any other district, must, within forty-eight hours after his arrival, and previous to unlading any goods, deliver to the collector of the district a manifest of the goods on board, or if in ballast only, he must so declare, and to the truth of which manifest he must swear or affirm; and also, that such manifest contains an account of all the goods which were on board of the vessel at that time, or have been since her departure from the place whence she sailed.

He must also deliver to the collector the permit which was given him by the collector of the district. If the master neglects so to do, he forfeits $100.

*Act 18th Feb. 1793, Sec. 23. †Ibid Sec. 24.

CHAPTER VI.

OF VESSELS ENGAGED IN THE FISHERY.

GOVERNMENT allows a *bounty* to vessels of the burthen of five tons and upwards, which are engaged in the bank and other cod fisheries. This bounty was, among other things, undoubtedly intended as an inducement to capitalists, to provide suitable vessels for carrying on this very useful, and now highly prosperous, line of business. The policy and wisdom of the measure, it is now too late to question. Under its influence our fisheries have become very important, not only as furnishing employment to a large class of hardy, industrious citizens, but as a means of individual and national wealth. Every year witnesses its rising importance.

This bounty is paid to them on the last day in December of each year. It is paid by the collector of the port where the vessel belongs. The vessel to be entitled to bounty, must be engaged at least four months in the bank and other cod fishery, and that, too, in the fishing season, which is between the last days of February and of November in each year. A vessel of the burthen of five and more tons, and not exceeding thirty, receives $3,50 per ton for each ton of her measure-

ment as ascertained by her enrollment. If the vessel is over thirty tons in burthen, the bounty is $4 per ton. If, however, this latter class of vessels, or any one of them, have on board a crew of not less than ten persons, and have actually been employed in the cod fishery at sea, for the term of *three and one half months*, but less than *four months* of such season, the owner thereof is entitled to a bounty of $3,50 per ton.*

No vessel, however, can receive an allowance for bounty to a greater amount than $360 for any one year.

When the vessel exceeds twenty tons in burthen, the owner is entitled to retain three-eights of the sum so received as bounty, and the other five-eights he must destribute among the several fishermen that have been employed, during the fishing season, on board; each fisherman drawing his share of the sum, so remaining, in exact proportion as his share of the fish caught, bears to the whole amount of fish caught by the whole crew.†

For example, suppose $100 remains to be divided in that manner among a crew of five persons, having unequal claims. A. having caught 10 bbls. B. 13 bbls., C. 17 bbls., D. 20, and E. only 5½ bbls.—Total 65½ bbls. As the 65½ bbls., is to 10 bbls. A's part, so is the $100, the fund to be divided, to A's proportion of said fund. The product is A's part. B. C. D. and E's proportions may then be obtained in the same manner.

* Act July 29, 1813, Sec. 5. † Ibid.

Previous to receiving such bounty, the owner of the vessel, *if she be of twenty tons and upwards*, must produce to the collector, authorized to pay the same, the origina agreement made with the fishermen employed on board, and a certificate subscribed by him, setting forth the particular days on which such vessel sailed and returned.

If the master of any fishing vessel, of twenty tons and upwards, neglects to enter into a written or printed agreement with the fishermen employed on board, the vessel will not be entitled to bounty.

Fishing vessels of *more than five and less than twenty tons burthen* are entitled to a bounty, as beforesaid, of $3,50 per ton, on condition that they land in the course of the preceding season a quantity of fish, not less than twelve *quintals* for every ton of their admeasurement. The weight is to be ascertained when *dried* and *cured* fit for exportation.

This bounty, when thus received, is to be accounted for as a part of the proceeds of the fares of such vessel, and distributed among those employed on board accordingly. An account of the weight, with the original adjustment of the fares among the owners and fishermen, together with a written account of the length, breadth, and depth of such boat, and the time she has actually been employed in the fishery, in the preceding season, must, in all cases, be produced and sworn to before the collector, in order to entitle the owner to an allowance of bounty.

If any fraud is made use of in the procurement of the bounty, the vessel is liable to be forfeited if found within the district to which she belongs, within one year from the time payment was made. Otherwise the owner, having practiced such deceit, must forfeit and pay $100. False declarations under this act are deemed and punished as perjury.

When a fishing vessel has completed her fishing term and has thereby become entitled to bounty, and afterwards, on her passage home, is wrecked or lost, her owner and crew may, on satisfactory proof being furnished to the comptroler of the treasury, of the wreck or loss of such vessel, be entitled to the same bounty as would have been allowed had no loss taken place.

The officers, and three-fourths of the crew, at least, of every fishing vessel must be American citizens, or persons not the subjects of any foreign prince or state.

The master, or skipper, of any vessel of the burthen of twenty tons or upwards, engaged in the bank and cod fisheries, bound from a port of the United States, to be engaged in such fishery, at sea, must, before proceeding on such voyage, make an agreement in writing, or print, with every fisherman employed therein, (except only an apprentice, or servant, of himself, or owner) and in addition to such term of shipment as may be agreed on, must, in such agreement, express whether the service is to continue for one voyage, or for the fishing sea-

son. It must also be expressed in such agreement, that the fish, or the proceeds of such fishing voyage, which may belong to the fishermen, shall be divided among them in proportion to the quantities or number of fish which they may have respectively caught. This agreement must be endorsed, or countersigned, by the owner of such fishing vessel, or his agent.*

Fishermen, who have engaged for the voyage, or for the season, and signed the articles, and afterwards have deserted from the vessel while the agreement remained in force, are liable to the same forfeitures, and penalties as deserting seamen and mariners. They may, also, upon like complaint and proof, be apprehended and detained in the same manner. All costs of commitment and of process, if paid by the master, may be deducted out of the share of such deserting seamen.

If any fisherman, shipped as above, refuse, or neglect to do his proper duty on board the fishing vessel, when ordered thereto by the master; or otherwise resist his just and lawful authority, to the detriment of such voyage, he forfeits to the use of the owner of such vessel, his share of the public allowance, or bounty, which he otherwise might have been entitled to. He, also, is liable for the damage which may ensue from such disobedience.†

*Act 19 June 1813, Sec. 1. † Ibid.

Where the fishermen deliver their fish to the owner of the vessel, or his agent, for the purpose of having them cured by him, and such owner, or agent, sell, or otherwise dispose of them to the injury of such fishermen, the vessel is answerable for their respective shares for six months after their sale. It is recoverable in the same manner as seamen's wages.*

The owner, or his agent, must produce a just account of the sales and division of the fish taken, according to such agreement; otherwise the vessel is answerable for what may be the highest value of the share, or shares, demanded. The owner, however, may always offset any demands he may have against any of the fishermen employed on board of his vessel, for supplies furnished them for the purposes of the voyage.†

Convention with Great Britian respecting fishing grounds. By a convention entered into between the United States and the British government, Oct. 20, 1818, it is agreed that the inhabitants of these United States may have in common with British subjects, liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from *cape Ray to the Rameau islands;* on the *western* and *northern* coast of Newfoundland from the said *cape Ray* to the *Quirpon islands;* on the shores of the Magdalen islands; and also on the coasts, bays, harbors, and

*Act 19 June 1813, Sec. 2. † Ibid. Sec. 2.

creeks, from *mount Joly*, on the southern coast of Labrador, to and through the straits of Bellisle, and thence northwardly, indefinitely, along the coast. This grant, however, is not to prejudice any of the exclusive privileges possessed by the Hudson Bay Company. The American fishermen, also, have a right to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador. When any part of the coast becomes settled, the fishermen must first obtain the permission of the owners of the land. The American fishermen have permission to enter any of the bays or harbors in the British dominions for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, *and for no other purpose whatever.*

CHAPTER VII.

SHIP OWNERS.

Who are liable as owners.

The owner of the ship is, in all cases, personally liable for necessaries furnished, and repairs made, by order of the master.* It is not, however, always a matter easily to be determined who is the owner. The ownership in relation to this subject is not determined by the register; nor will a regular bill of sale of the property, in all cases, exempt the former owner from responsibility for supplies furnished.†

Hence the *mortagagee* of a ship, who merely holds the legal title for his security, and neither *appoints her commander*, nor *participates in the profits* of the adventure, *is not liable as owner* on the contracts, or for the conduct of the master.‡

But if the mortgagee of a ship appoints her master and crew, and the vessel is employed in his service, he then is responsible for the contracts and conduct of the master. The question is, to whom was the credit given; and if the mortgagee has, by his own acts, held himself out as owner, so that the

* 4 Barnw. & Ald. 352. † 7 John. 308, 15 John. 298. 7 Cowens, R. 697. ‡ 8 John. R. 159, 15 Mass. R. 477, 6 Greenleaf, 474.

creditor may have fairly been presumed to have parted with his property on the strength of the credit of the mortgagee, he is responsible.

Charterer. The charterer of a vessel, for a certain period or voyage, and who appoints her commander and crew, is considered the *owner* for that period or voyage, and is therefore liable for necessaries furnished on the order of the master for the use of the ship.

But when, notwithstanding the charter of the vessel, the general owner retains possession, and appoints her master, the charterer is not liable as owner.*

The question, who is liable to third persons for repairs made or necessaries furnished on the order of the master, for the use of the ship, depends on the inquiry, whether the lender, or hirer, under a charter party, has the possession, command, and navigation of the ship.*

To constitute the charterer owner for the voyage, so as to charge him, he should have the *possession* and *entire* control and direction of the vessel; so that the general owner, for the time being, would have no right to interfere with her management.†

Lien. If the owner retains possession, and victuals and mans the vessel, he has a lien upon the cargo of the charterer shipped on board for its freight.

* 8 Cranch R. 39. Kent, Com's., Vol. 3, p. 133. 15 Mass. R. 372.
† 4 Greenleaf, 412.

But where the charterer takes possession, and navigates the ship, the general owner has no lien for the freight, because he is not the carrier for the voyage.

If the owner of a vessel charters her to the master for a certain period of time, the master covenanting to victual and man her at his own cost, he is to be deemed the owner for that term.*

Of the rights and liabilities of part owners.

The several part owners of a ship are tenants in common. Each has his distinct though undivided interest; and when one of them is appointed to manage the concerns of the ship for the common benefit, he is termed the ship's husband.†

Part owners are never considered and treated in law as partners, unless they make themselves partners by some special acts of their own. One part owner has no authority to dispose of a share greater than he actually holds in the ship. But if, by their acts, they have constituted themselves partners, then any one of them can dispose of the whole ship.

As the law presumes that the common possessor of a valuable chattel will desire whatever is necessary to the preservation and profitable employment of the common property, *part owners*, on the spot,

* 8 J. R. 272. † Kent's Com's, vol. 3. p. 151.

have an implied authority from the absent part owners, to order, for the common concern, whatever is necessary for the preservation and proper employment of the ship.

If, however, the credit is given exclusively to the ship's husband, or part owner, who ordered the supplies, and his note is taken for the amount, the creditor cannot afterwards repudiate the note and call upon the other part owners for payment. By taking the note, he discharges the other owners.* The reverse of this has been held in New York.

Where repairs are made upon a ship by order of the master, the part owners are each liable for the whole expense of the repairs. So when the repairs are ordered by the ship's husband, or by one of the part owners in person.†

Where a part owner pays the whole bill for repairs, or more than his proportion, he can call upon the remaining part owners for contribution.

While the ship continues to be employed by the same persons, no one of them can be entitled to partake of the profits until all that is due, for outfits for the voyage, repairs, &c. has been discharged.‡

In a case reported in Cowper, 469, it was more than intimated that one part owner might have a lien for advances made for another part owner upon his share in the ship, in the same manner as part-

* 10 Mass. R. 47. † 16 Johnson's, R. 89. Abbott, note, p. 76.
‡ Abbott, p. 94.

ners in trade have upon each others shares of their merchandise.*

While the possession of a ship is retained by the person who repairs her, it is specifically chargeable for repairs; but when the possession is parted with, the lien is lost.†

One part owner has no authority to effect insurance for another part owner on his share of a vessel, and the part owner thus insured for will not be bound to pay the premium note, unless he either previously directed, or subsequently assented to, the insurance.‡

Employment of the ship. If there be no certain agreement among the owners of a ship respecting her employment, and they are unable to agree upon a voyage, the court of admiralty will, upon application, authorize the majority in value of the part owners to employ the ship upon their own account, and for their own particular benefit, first giving the minority security to the value of their shares, for the safe return of the vessel.

This practice of the admiralty courts is dictated by the plain reason that "ships were made to plough the ocean, and not to rot by the wall."

If the minority are in possession, and refuse to give the vessel up, or to employ her, the majority can obtain possession by application as above: and if the majority are in possession and choose to employ her upon an adventure, not sanctioned by the

* 20 Johns. R. 634. † 11 Mass. R, 34. ‡ Abbott, p. 76, note.

minority, the latter can procure a warrant for the arrest of the ship, and unless security is given by the majority for the value of their shares, detain her.

Though the admiralty courts have thus claimed and exercised this very salutary jurisdiction over the rights of part owners, substantially securing to each the honest exercise of their right to the use of their property, when consistent with the rights of others, yet they have refrained from exercising any power over obstinate part owners, to compel a sale by them of their shares.

CHAPTER VIII.

SHIP'S HUSBAND.

The difficulty of administering, with unanimity, the affairs of a ship belonging to many owners, leads to the appointment of some person in whom they all have confidence as *ship's husband*. Sometimes the ship's husband is merely an agent for conducting the necessary measures on the return of the ship to port: as making the proper entries at the custom house from the master's manifest; superintending the landing of the goods; checking the measurements; procuring the proper surveys of damages, to avoid disputes; seeing the freight settled before the lien is quitted, and so forth. But the appointment to which our attention is here called is one of more importance. It is a more general agency for conducting the affairs of the vessel in place of the owners. The person so appointed is empowered to enter into contract for furnishing; to appoint the master and seamen; to enter into charter parties; and, generally, to act as sole representative of the owner.

Who may be a ship's husband. The ship's husband may either be a part owner or a stranger: and the authority may be conferred either by express deed or commission; or even without a written

commission, by verbal appointment, or permitting him to exercise the functions of ship's husband, so as to give him the character of accredited agent of the owners.

How appointed. Where he is appointed by written commission, that commission must be executed by all the joint owners. It may refer generally to the customary powers and duties of the ship's husband; and where special, should empower the agent to regulate the appointment of the master and the hire of seamen, to make contracts of furnishing and affreightment; to levy freights, pay wages, make the necessary disbursements on account of the ship, and generally, to act discretionarily for all the owners.

It is chiefly in case of one of the joint owners taking the management, that the powers of ship's husband are constituted without written authority. But both in that case, and even where a stranger exercises the powers of a ship's husband, they will be bound to reimburse and recompense him; and his contracts in the proper line of a ship's husband's duty will bind them; provided the nomination, or the accrediting of the ship's husband, be proved.

The duties of a ship's husband are—1. To see to the proper outfit of the vessel, in the repairs adequate to the voyage, and in the tackle and furniture necessary for a sea-worthy ship. 2. To have a proper master, mate and crew, for the ship, so that in this respect she shall be sea-worthy. 3.

To see to the due furnishing of provisions and stores, according to the necessities of the voyage. 4. To see to the regularity of all the clearances from the custom house, and the regularity of the registry. 5. To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. 6. To enter into proper charter parties, or engage the vessel for general freight, under the usual conditions; and to settle for freight and adjust averages with the merchants: and 7. To preserve the proper certificates, surveys and documents, in case of future disputes with insurers or freighters, and to keep the regular books of the ship.

Power of a ship's husband. His powers, where not expressly limited, may be described as those requisite to the performance of the duties above enumerated. He cannot, without special powers, borrow money generally for the use of the ship; though he may settle the accounts of the creditors for furnishings, or grant bills for them, for debts against the concern, whether he has funds in his hands or not with which he might have paid them. He has power to receive the freight, but, it would seem, he has not power to take bills for the freight, or surrender up the cargo and thus destroy the lien upon it, unless it be expressly provided for in the charter party, or unless he has special authority to grant such indulgence. Under the general authority of ship's husband, he has no authority to

insure, or to bind the owners for premiums; this requiring special authority. The authority of the master as to the employment, repair, or direction of the ship, is superseded by the presence of the ship's husband.

CHAPTER IX.

AGENTS.

Of the duty of Agents to procure Insurance.

A very frequent and usual method of procuring insurance upon vessel, freight, or cargo, is, by transmitting an order, for such insurance to be made, to some agent of the party owning the property. That these orders, thus forwarded, should be promptly executed, is often of the greatest moment. It becomes, then, a proper subject of inquiry, how far the person selected to act as agent in such matter, is *bound* to execute the commission entrusted to him.

One principle is plain, that every agent is bound to execute the orders of his principal, whenever, for a valuable consideration, he has undertaken to perform them. And this duty may appear from express agreement, or by clear implication. The former does not need to be treated upon.

Who may insure. The merchant, or factor, to whom the goods are consigned for him to sell, may insure them, both for himself and his principal. He is not, however, positively *bound* to insure, unless he has received orders to insure, or the usage of trade, or mode of dealing between them, raises an implied obligation to insure.*

* Story on Agency, p. 99.

Whether mere naked consignees, who have the goods consigned to them without power to sell, have a right to insure for themselves, or their principals, is yet a question.

Who must insure. It has been before stated that, where an agent has expressly contracted to insure, he *must* insure, or suffer the damage that may ensue to his principal.

It is, also, clearly settled that, where a merchant abroad has effects in the hands of his correspondent here, he may order him to insure; and the correspondent so ordered *must* effect the insurance as directed.*

So, too, where the merchant has no effects in the hands of his correspondent, yet the course of dealing between them has been such that the one has been used to send orders for insurance, and the other to comply with them; in such a case, the former has a right to expect, that his orders for insurance will still be obeyed unless the latter gives him notice to discontinue that course of dealing.†

Another is, where the merchant abroad sends bills of lading to his correspondent here, and ingrafts on them an order to insure; in such a case the agent is bound to obey, *if he accepts them.*

Another may be added, which is, where the *general usage of trade* requires the agent to insure.‡

When an agent is *ordered*, or *bound*, to procure

* Story on Agency, pp. 178 and 179. † Ibid. ‡ Ibid.

insurance for his principal, and from any cause cannot effect it, it seems reasonable that he should be required to give, as soon as practicable, intelligence of such inability, for otherwise the principal may be subjected to a loss, which he could have provided against, by procuring insurance to be made elsewhere.*

Agent bound to use due diligence. If the agent is *bound* to procure insurance, or *undertakes* to do it, he must use *due diligence.* If he procrastinates and neglects to effect the insurance in a reasonable time after notice to him, or undertaking by him, and a loss ensue to his principal, he is *liable.* What is a proper exercise of due diligence and skill in obtaining insurance, is, in some cases, a matter of great nicety and difficulty.

On the one hand, an agent, who acts *bona fide* in effecting an insurance for his principal, using reasonable skill and diligence, is not liable to be called upon, because the insurance might possibly have been procured from other persons upon better terms, or to include additional risks, by which the principal might, in the event, have been indemnified.†

On the other hand an agent, in a like case, is bound to have inserted in the policy all the ordinary risks and chances which are usual and proper to secure the principal for the contemplated voyage.‡

* Story on Agency, pp. 178 and 179. † Ibid. 179. ‡ Ibid.

And if he omits to have them inserted when a reasonable attention to the facts stated in his orders, or the nature of the voyage, or the state of the property, or the objects intended, would have induced other insurance agents, of reasonable skill and diligence to have had them inserted, he will be liable, in case of any loss, for his negligence.*

The same rule will apply, if such an agent negligently, or wilfully, conceals a material fact, or affirms a false fact, whereby the policy is avoided; for his duty in each case is violated.†

The agent, procuring insurance, is bound to use proper diligence to ascertain whether or not the underwriters are in good credit at the time of procuring the policy.‡

So if an agent has procured a policy and it remains in his hands, he is bound to apply to the underwriters for payment of it within a reasonable time; and if a loss occurs by his neglect, he will become responsible therefor.

Of the authority of Agents.

Of their authority to abandon property on which they have procured insurance to be effected, it may be said, that they have an *incidental* authority to abandon property which is insured, to the underwriters, in the case of a total loss.§

* Story on Agency, p. 180.
† Ibid. 180.
‡ 1 Valin. lib. p. 33.
§ 6 Cranch 268, 272.

So an agent to insure, has, if the policy remains in his hands, an incidental authority to receive payment of losses thereon.*

So an agent employed to subscribe a policy for the principal, has an implied authority to adjust the loss upon the same policy; and to receive payment in money; but not to receive payment in any other manner.†

So an agent employed to buy a cargo for his principal, if no other means or funds are provided, has an incidental authority to give notes, or draw and negotiate bills on his principal for the amount.‡

If the agent has procured insurance for his principal and paid the premium himself, and it afterwards appears that the policy never attached, or was void without his knowledge, he will be enabled to recover back, in his own name, the premium he thus, without consideration, paid.§

* 2 Cowp. R. 641.
† 1 Cowp. R. 43.
‡ 6 Louis R. 587.
§ 6 Wheat. 565.

CHAPTER X.

OF FACTORS OR CONSIGNEES.

THE factor is most often known by the term commission merchant or consignee. He is employed to sell goods or merchandise, consigned, or delivered to him, by, or for his principal, for a compensation, commonly called factorage or commission. The goods received by him for sale are called a *consignment*. Generally the factor or consignee is a person living abroad; or at a distance from his principal. But such need not be the case. The relation may as well subsist between neighbors as any others, only that the necessity for such a relation between them does not often exist. There are different sorts of consignees; some have a power to *sell*, *manage* and *dispose* of the property, subject only to the rights of the consigner. Others have a mere naked right to take possession.

A factor is called a *home* factor when he resides in the same state or country with the principal; and a *foreign* factor when he resides in a different state or country. Sometimes, in voyages abroad, an agent accompanies the cargo, to whom it is consigned for sale: and who is to purchase the return cargo out of the proceeds. In such case the factor, or consignee, is, usually, called a *supercargo*.

The relation of *consignor* and *consignee*, may be created by an express instrument of agreement between the parties, or by the mere transmission of the bill of lading or invoice of the goods, with a letter of instruction from the consignor to the consignee. If he accepts the bill of lading or invoice, so sent, he is bound to all the duties, and liable to all the obligations, of a consignee.

When the consignee undertakes, for an additional compensation, to guaranty to his principal the payment of the debt due by the buyer, he is said to receive a *del credere* commission.

Subject only to these special rights of the factor or agent, the principal may assert his own general rights over every contract of purchase and sale made on his behalf in the course of the agency. The principal may discharge the *lien* of the factor, and then recover the whole of the price of the purchaser, or he may recover the balance of such price after deducting the amount of the agent's lien thereon. He is the legal owner of the proceeds of his goods in whose hands soever they may be, except to the extent of the *lien*. The purchaser, however, will be protected in making payments, either to the principal, or to his agent, provided no notice has been given him, restraining this general right.*

The above is subject to several qualifications. 1. The principal cannot sue, or be sued, on any con-

* Story on Agency, 424.

tract made by and in the name of his agent, where the same is by an instrument under seal. 2. A *foreign* factor, buying or selling goods, is treated, between himself and the other party, as the sole contracting party; and the real principal cannot sue or be sued on the contract.* This latter principle is founded upon a well established usage of trade and is strictly adhered to for the convenience and safety of foreign commerce. 3. Where the consignee has a demand against his principal equal to, or exceeding, the amount of the goods bought or sold, the principal has no right of action against the purchaser, unless with the consent of the consignee.†

Consignee's right to commissions. The *general* rule of law as to commissions is, that the whole service or duty must be performed before the right to any commission attaches, either ordinary or extraordinary; for an agent must complete the thing required of him before he is entitled to charge for it.‡

But the right of the consignee to receive commissions at all may be defeated by some act of his own, or by the character of the transaction itself. Thus the consignee cannot recover commissions on an illegal transaction, whether the same be positively prohibited by law, or by good morals, or public policy. He must faithfully perform all the duties of his agency in regard to his principal, for it

* Story on Agency, 434, 435, 456. † Ibid. 435. ‡ Ibid. 338.

is a condition precedent to the title to the commissions, that the contemplated services should be fully and faithfully performed. Thus for example, it is ordinarily the duty of agents to keep regular accounts and vouchers of the business in the course of their agency. If this is omitted, it will be construed unfavorably to the rights of the agent. So if an agent grossly misconduct himself in other respects, in the course of his agency; as if he should violate his instructions; or wilfully confound his own property with that of his principal; in these and like cases he might forfeit his whole title to compensation, if the circumstances were aggravated; or at all events, he would be made to bear all the losses sustained by such misconduct.*

A commission merchant, or consignee, may buy and sell the goods of his principal in his *own name*, as well as in the name of his principal. He has entrusted to him the possession, management, control, and disposal of the goods to be bought or sold, and has a special property in them, and a *lien* on them.†

Where the agency is created by a written instrument, the consignee must be governed by it, for if with the hope and prospect of advantage to his principal, the consignee deviates from his instructions, or from his contract, and a damage ensues to his principal, the consignee is liable for the loss;

* Story on Agency, p. 340, 341. † Ibid. 34, 98.

and if, on the other hand, such deviation should result in an advantage to his principal, the agent cannot participate in that advantage. He therefore, has nothing to gain, and runs all the chances of loss, if any should ensue, by such deviation.

Unless there be some special instruction to the contrary, the consignee may, in all cases, sell upon credit. With an auctioneer it is said to be otherwise.*

Factors or consignees have no incidental authority to barter the goods of their principals. Nor can they *pledge* such goods for debts due by *themselves*, or for advances made to them on their *own account;* but they may *pledge* them for advances lawfully made on account of their principal, or for advances made to themselves to the extent of their *lien* on the goods.†

So factors may pledge the goods of their principal for the payment of the duties and other charges due thereon ; and, indeed, for any other charges and purposes, which are allowed or justified by the usage of trade.‡

The consignee has a *lien* upon the goods consigned to him to the extent of his claim for commissions advances and disbursements.§ This lien is not only on the goods, but upon the price in the hands of the purchaser.‖ To this extent, the con-

* Story on Agency, p. 198. † Ibid. 101, 219, 220.
‡ Ibid. 100, 101. § Ibid. 98. ‖ Ibid. 386.

signee may insist upon payment from the purchaser to himself, in opposition to the claims of the principal.* Where, however, the factor would preserve his claim for commissions, &c., upon the purchase money in the hands of the purchaser, he should give him notice of such claim before payment has been made to the principal.†

The consignee has a *lien* on the goods consigned to him, and upon the proceeds of the same in the hands of the purchaser, not only to the extent of his commissions, advances, and disbursements upon those *particular* goods; but his *lien* upon them extends to the *general balance of accounts* between him and his principal. It extends also to all sums which the consignee is liable to pay for his principal, as surety, or otherwise, where the liability was incurred in the course of the business of the agency.

It is said in Story on Agency, (vol. 1, chap. 13, p. 350,) that "where a factor receives a *del credere* commission upon the sale of goods, and he has made advances thereon, he must be deemed by that *very guaranty* to wave any *personal* recourse to his principal for such advances, and to rely solely on the fund for reimbursement." This principle of law, thus laid down, does not seem to be founded upon any positive decision to that effect, and its soundness may well be questioned.

* Story on Agency, 421. † Ibid. 422.

CHAPTER XI.

SHIP MASTERS.

Of ship masters—The appointment of the master—His authority over the seamen—His authority respecting the employment of the ship—His authority to sell the ship—His authority to repair the ship, &c.—His authority to hypothecate the ship—His authority to hypothecate the cargo—His relation to the cargo—The charter party—The duty of the freighter—The bill of lading—The carriage of the goods—The delivery of the goods—His liability for bad stowage—His liability for embezzlement—The payment of freight—His duty to employ a pilot—Deviation by the master—Barratry of the master.

The office of the ship master is one of great power, dignity, and responsibility. An old writer on maritime law says the title implies "honor, experience, and morals." By some foreign ordinances the master, before entering upon his duties, has been required to be examined, and certified to be fit, by his experience, capacity, and character, for the station. Without inquiring whether the latter precaution was wise and politic, it is certain that the master's station is one of commanding interest to his employers, and to those placed under his command. Vast and momentous interests are entrusted to his care, and to him is committed a wide and extended discretion. He is entrusted by his employers with their property, and often made their agent for its care and disposal, in distant parts, away from those checks and safeguards, which are usually thrown around agents when acting for their

principals. His faithfulness needs then to be undoubted. Unforeseen perils and vicissitudes lie naturally in the path of the ship master, and, therefore, to him is committed great discretionary powers. Cases are always arising in which he must act promptly for the good of all concerned, and that, too, without having the aid of previous precedents to guide his decision. He requires, then, a sound and matured judgment. He needs to be able, in any emergency, to look calmly at the facts, apply to them maritime principles, and from them to draw his conclusions as to what should be done; and not to act from mere conjecture and impulse. Being entrusted with the safe conduct of the ship through the many perils of the deep, great watchfulness, prudence, and caution is required at his hands. He needs, therefore, to be a man of great experience and practical skill, and to possess a thorough knowledge of the art of navigation. He should possess great firmness of character, and fearlessness under pressing dangers. He should be able to dissipate fear, and inspire confidence in the breasts of those around him, and be possessed of the courage and presence of mind necessary to meet and surmount extraordinary perils.

His authority over those on board is necessarily summary, and often absolute. The character of the service requires that the propriety of his commands should not be questioned, but that instant and unhesitating obedience should be promptly

yielded. The preservation of the ship, and the property and lives on board, demands of the master, in times of great danger, instantaneous decision and desperate commands. He needs the talent which shall fit him to command in the midst of danger, and courage and coolness when involved in fearful perils. These powers, thrown upon him by necessity, require that he should be a man of great magnanimity. Few men can stand the intoxication of power;—especially power like that exercised by the shipmaster. He wants to be a strong minded man, of good judgment, with a high sense of the dignity and accountability of his station, and a just regard for the rights, ease, and happiness of his crew. In a word, he needs the disposition to use his power, as well for the happiness and comfort of his crew, as the preservation of the property under his care. He should never forget the character and hardships of the men with whom he has to deal. That their waywardness and foibles spring legitimately from the nature of their business. That however very many of them may appear in principle and action, yet they are men, open hearted, generous, and free to a fault. That, like himself, they possess those fine feelings of our nature, that smart under harshness and oppresion; that kindle with enmity over wrong; either real or imaginery, and burn with shame when disgraced before their fellows by uncalled-for correction. He should never permit himself to believe

that mariners are impervious to kindness, or incapable of appreciating favors and attention. The master is, by station, as well as by education and intellect, their natural and proper guardian, and should watch over their health and comfort with parental fidelity.

The master is charged frequently with the sale of the cargo and the reinvestment of the proceeds, he should be fitted to superadd the character of merchant to that of commander; and he ought to to have a general knowledge of the marine law and of the rights of belligerants, and of the duties of neutrals, so as not to expose to unnecessary hazard the persons and property under his protection.

OF THE APPOINTMENT OF THE MASTER.

If the ship belong to several owners, the majority are entitled to appoint a master, and there seems to be no other redress to the minority than either to sell their shares, or to resort to such remedy as the law gives them in case of a voyage which some of them disapprove.*

The appointment of master requires no written warrant of authority, or peculiar solemnity. It is a contract with the owners, or with the ship's husband for them, and may be entered into by verbal agreement. The mere employment of master, with

* Vol. 1, Bell's Com. p. 412.

possession, is sufficient to impose on him all the duties, and to vest him with all the legitimate and customary powers of master.*

The master may delegate his power during the voyage by naming another master; and in questions with third parties the master, so named, will, even where the owners have prohibited the master from delegating, be vested by possession of the ship, and exercise of the office, with all the powers of master.†

In case of the sudden death of the master, or his removal by other casualty, the command of the ship devolves upon the first mate, as an incident to his station; but that officer cannot claim the command as a right, if the master, or other authorized agent of the owners, shall choose to appoint another person.

In case of the death, or detention of the master in a foreign port, where the owner has no authorized agent, it is customary for the consul, or consular agent of the government of the country to which the ship belongs, to appoint a successor.

The master is the confidential agent of the owners, and has an implied authority to bind them, without their knowledge, by contracts relative to the *usual employment* of the ship.‡

The master is appointed by the owner, and the appointment holds him forth to the public as a per-

* Vol. 1, Bell's Com. p. 412. † Ibid.
‡ 3 vol. Kent's Com. 161.

son worthy of trust and confidence. The master is always personally bound by his contracts, and the person who deals with the captain in a matter relative to the usual employment of the ship, or for repairs, or supplies furnished her, has a double remedy.

The master may, however, exempt himself from liability, by expressly confining the credit to the owner, and stipulating against his personal liability.*

The owner can dismiss the master, at any time in his discretion, without being liable in damages for the act. In the Scotch admiralty, it has been decided that the master may be dismissed by a majority of the owners, although he be a joint owner with them in the vessel.†

According to our admiralty decisions, if the master is a part owner, and the other part owners desire his removal, it is necessary that some special reason should be assigned for dispossessing him of the command.‡

The master is bound to conduct himself with good faith, diligence, and competent skill, and he is responsible to the owners, as their agent, for his conduct.

His misconduct will subject him to the forfeiture of his wages, if it be gross in its circumstances, and attended with serious damage to the owner.

* 9 East. R. 432—1 Term. R. 108. † 4 Rob. R. 287. ‡ Ibid.

For faults of a less aggravated nature, the damage consequent thereupon, will be a charge upon his wages.

Chief Justice McKean said in a case reported in 1 *Dall.* 184, "that it is a wrong position, that a master of a ship is not answerable for any error of judgment; but only for fault of the heart, in civil matters. Reasonable care, attention, prudence and fidelity, are expected of him; and if any misfortune or mischief ensue from the want of them, either in himself or his mariners, he is responsible therefor in a civil action."

If the owners are obliged to pay damages on such account, they may recover the same from the master.*

OF THE MASTER'S AUTHORITY OVER THE SEAMEN.

The necessities of the sea service have given to the ship master, when at sea, great authority over the officers and crew under his command. A prompt and cheerful obedience of orders, on the part of the seamen, is of the utmost importance. If the crew, when on the ocean, should become obstinate or indolent, and refuse to yield that prompt and uncomplaining obedience which is so necessary for the preservation of the ship and cargo, without authority in the master to enforce obedience by correction, the whole adventure may

* 4 Rob. R. 287.

be abandoned to the mercy of the wind and waves. It has, therefore, ever been the disposition of maritime courts, to uphold, with a firm hand, a reasonable exercise of the authority committed to the master and other officers of the ship. A regular and healthy subordination on board, is vital to the prosperity and continuance of maritime adventures. In the progress of commercial transactions, tempests are to be met and surmounted, angry winds and waves are to be encountered, and overcome by watchfulness, address, and skill, and rocks and shoals avoided by prudence and care. The master needs, then, that his whole ship's crew should be of one mind, attentive, watchful, and obedient. Savage countries are, often, to be visited, and trade carried on with persons crafty, ferocious, and vindictive, and where the whole profits of the voyage depend upon vigilance, industry, and exclusive devotion to the interests of the ship.

These considerations, combined with the known character of sea-faring men, have made it necessary that great power and authority should be placed in the hands of the master. The character of sailors is made up of contrarieties,—of frailties, and of merits. We find often times blending in the same character, the most captivating gallantry, with the most stuborn indolence. Great care and watchfulness, sometimes giving way to most censurable thoughtlessness and indifference.

The authority of the master, then, needs to be commeasurate with the importance of the trust, the dangers of the voyage, and the difficulties of the service. But commeasurate with his power, is his legal accountability. His power is given to ensure order, not to gratify revenge; to preserve both the lives and property embarked, not to be used harshly, unreasonably, or with unnecessary severity.

The master can punish only to promote good discipline and compel obedience to lawful orders on board of the ship. He is not clothed with judicial authority to sentence seamen to punishment for their offences. Therefore the master cannot confine his seamen on shore, in a foreign port, unless with an intention to take them on board again for the voyage.

The master, when in a foreign port, may, in cases of flagrant offences on the part of the seamen, confine them in gaol on shore, but will not be justified when the offence is of a less serious character.

No authority to imprison seamen, for offences, is given the master in a domestic port.

The master, when on board, has the sole authority to authorise punishment to be inflicted upon the crew, and if he is present when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally responsible for the act.

When the ship is in a foreign port, and an occasion arises calling for the punishment of any sea-

man on board, it is the master's duty to consult the consul, or consular agent of his government, if such officer resides at that port, and to be governed by his advice in such cases.

OF THE MASTER'S AUTHORITY RESPECTING THE EMPLOYMENT OF THE SHIP.

The master is the confidential agent of the owners, and has an implied authority to bind them, without their kowledge, by contracts relative to the *usual* employment of the ship. His implied authority relates to the usual employment of the particular ship of which he is master. If the ship be a *trading ship*, the master may be supposed, if nothing appears to the contrary, to have a general authority to charter the ship, or stipulate for the carriage of goods on freight, in a foreign or distant port where the owners have no agent.*

The owners are, in general, answerable for all lawful contracts connected with the employment of the ship for which the character and situation of the master affords the presumption of authority. If he exceeds the authority given him, yet if there be a *fair presumption* that he has such authority, and the party contracting has no knowledge of its limitation, the owners are bound by his contract. Thus it is expressly laid down, that if the master appoint another man to take his place, contrary to

*Abbott, p. 92.

the positive orders of the owners, they are yet responsible for the conduct of the master so appointed against their will.*

It has been before said, that the incidental powers of the master are, however, restricted to those which belong to the *usual employment*, or business of the ship. Thus, if the ordinary employment of the ship has been the carrying of cargoes on the *sole account* of the owners, the master has no *implied* authority to let the ship to *freight*, even in a foreign port. So if the ordinary employment has been to take goods on board on freight, as a *general ship*, and common carrier, the master will not be presumed to possess authority to let the ship on a charter party, for a special, and different business. So, if the ship has been accustomed to carry passengers only, the master will not be presumed to possess authority to take goods on board on freight. So, if the ship has been accustomed to the coasting trade, or the fisheries, or to river navigation only, the master will not be presumed to possess authority to divert the ship into another trade, or business, or voyage, on the high seas.†

If the party contracting with the master knows what his instructions are, he is bound by them, and the master should, for his own security, as a general rule, acquaint those with whom he contracts, with the nature and extent of his authority.

In the case of a general trading ship, both at

*Abbott, p. 92. †Story on Agency, Sec. 121.

home, and in a foreign port, it rarely happens that the owner interferes with the receipt of the cargo; and Mr. Abbott says, that, "without doubt, they are bound by every contract made by the master, relative to the *usual* employment of the ship."*

Where the master makes the charter party in his own name, the owners are not *personally* bound; but the ship and freight, and therefore, indirectly, the owners, to the extent of the value of the ship and freight, are bound to the performance.†

If the owners themselves have made a special contract for the employment of their ship, the master cannot, by the general and implied character of his office only, annul such a contract, and substitute another for it with the other contracting party.

The master of a ship, in his general character of agent for the owners, has a right, in a foreign port, to contract for the charter of the ship, and the owners will be bound by such contract of the master.‡

The master cannot, merely in his character of master, bind the owners by a contract *under seal*, so as to subject them to an action under the covenant. To bind them by an instrument under seal, he must hold their power of attorney, giving him authority so to bind them.§

The master, unless he expressly provides against it, will himself be *bound* upon the charter party made by him, as well as the owner.

*Abbott, p. 93. †Ibid. 93. ‡6. Greenleaf, 160. §Ibid.

If the master has not exceeded his authority in the charter of the ship, and can show satisfactorily that the credit was given exclusively to the owner, he is discharged from his liability.*

A purchaser of the vessel during the voyage is bound by the contracts of the master, made during such voyage, and after such purchase, and made within the scope of his authority.†

OF THE MASTER'S AUTHORITY TO SELL THE SHIP.

It was formerly held that the master had no authority, under any circumstances, to make sale of the ship. At least, that was supposed to be the opinion of the lords Hale and Holt. But as the wants of navigation developed themselves, a disposition was manifested to relax this rule in some measure, but with great caution. It was thought to be a dangerous power to entrust in the hands of the master. That it was open to abuse, to collusion and fraud. It was even held that the master, acting under an order of the Vice Admiralty Court, could not make a sale of the ship, so as to bind the owners. But in later decisions the master's authority has been extended, but with great jealousy, and confining it to cases of *urgent* and *inevitable* necessity. So, too, it was first held that such sale could not be made, by the master, except on a *for-*

* Story on Agency, p. 298. † 6. Mass. R. 422.

eign shore; but late American decisions have so far relaxed the rule as to permit him to sell, as well on a *home*, as on a *foreign* shore, if the same *urgent* necessity exists for immediate action. The purpose of this chapter will be to assist the master in deciding when such *urgent*, *inevitable* necessity exists.

Such a necessity as will justify the master in selling the ship, can seldom take place on a *home shore*, and in the *vicinity* of the owner. This is so, because the only principle on which a sale of the ship, by the master, can be justified at all, is, that the property is so situated that it must be disposed of *immediately*, or an onerous expense be forthwith incurred to protect the ship from *serious injury*, or *total loss*. If the master can communicate with the owners *easily*, and *expeditiously*, and no serious injury is likely to result from the necessary delay, he must not sell, but wait the orders of the owners. An *urgent*, *inevitable necessity*, is a necessity that does not admit of delay; that requires prompt and instantaneous action; it is a case where to wait for the orders of the owners would be at the imminent risk of the property, and without prospect of benefit to the owners.*

It can seldom happen to be the duty of the master to sell the ship,—except in the case of a shipwreck of the vessel, where she is got into port in a

* 5 Mason, 481. 2 Pick. 254.

disabled state; and in case of her being stranded, partially destroyed by fire, or rendered unseaworthy by age.

One thing the master must bear steadily in view, and that is, that there must be a *real* and not a *fancied* necessity for the selling of the ship. The mere fact that the master acts *honestly* and in *good faith*, sincerely believing that the good of all concerned requires the sale to be made, does not justify the sale, unless the circumstances do *in fact* justify it. If the validity of the sale is called in question in a court of law, the facts with regard to the situation of the ship, brought to the notice of the jury, must be such as to satisfy *them* that there was a *moral necessity* for the sale, so as to make an *urgent duty* upon the master to sell for the preservation of the interest of all concerned.*

If the circumstances be such that an owner of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion that the vessel could not be delivered *at all* from the peril, or not without the hazard of an expense, *utterly disproportionate* to her real value, as she lies, then a sale by the master is justifiable.†

The mere fact that the vessel is insured, and that the injury to the vessel is such as to entitle the owner to abandon her to the underwriters, does not, of itself, authorise the master to sell her. The

* 5 Mason, 476. † 2 Sumner, 206.

insured may elect to repair her, and they certainly should have the opportunity to make the most of what, at best, must subject them to more or less loss.

When the ship has become a wreck, and the master believes, from the nature of the damage, that the vessel is unworthy of repair; or, if stranded, cannot be removed without great expense, the usual, and perhaps the best course, is for the master to call to his aid the counsel of others. This, however, is upon the supposition that he cannot communicate, in time, with his owners. If an American consul or commercial agent resides at the port, the master should apply to him to appoint three or more competent persons, skilled in such matters, to make a survey, and report the state of the vessel, the amount of damage received, and the probable expense of repairing the same. If no consul or consular agent resides at the port near which the disaster happened, then the master may procure the appointment to be made by some officer of the government of the country where the disaster happened. Their survey, when made, should be sworn to before some justice of the peace.

This survey, when made by competent persons, in good faith, without any appearance of collusion or fraud, is good evidence to support the master, but not *conclusive*. If the owners, or insurers, can prove by other and better testimony, that the surveyors were *inaccurate* in their estimates, or *exag-*

gerated the damage, and that no such necessity did *in fact* exist, the sale, though made in good faith by the master, on the recommendation of such surveyors, will be void.*

With respect to such surveys, chief justice Parker remarked, "that where the vessel has been seriously injured, so as to make a survey necessary, and the master acting in good faith calls a survey; and persons of competent skill and perfectly disinterested are appointed, and they, after a full and careful examination, find her essentially injured, and come deliberately to the conclusion that the costs of repair will exceed the *worth* of the vessel after being repaired, a moral necessity is imposed upon the master to act according to their advice.†

The master cannot become a purchaser himself at such a sale; and if he purchases of a direct purchaser, after the sale, the court will search the transaction to the bottom to see if good faith has been exercised on his part, before it will give validity to such a title.‡

The purchase of the wreck, by any part of the surveyors, would lead to violent suspicions of their good faith and integrity. It would be likely to shake the confidence of the court in their estimates and representations.

When the ship, or any part of her tackle, apparel, or furniture, is sold by order of the master, for the benefit of whom it may concern, the sale must be

* 2 Pick. 254. † Ibid. 264. ‡ 5 Mason, 476.

by auction, and the master should, by no means, omit to give suitable public notice of the sale. When the sale is determined upon, the master is justified in making it in any way that promises to yield the most for the property. It may be by exposing the whole for sale in one lot, or by dividing it into parcels, whichever may seem likely to produce the greatest amount.

Where the circumstances justify a sale of the ship by the master, it matters not whether the vessel be insured or not; for if she be insured, then he acts as the agent of the insurers in making the sale, and must hold the money received therefor for their use. So, too, if she has changed hands, or been mortgaged, since leaving port, the master acts in conducting the sale as the agent of the owner, in *fact*, whoever the same may be.*

In many of the ports of the United States, the insurance offices have agents, whose duty it is to look after wrecked property on which their principals have insured. In case of shipwreck, it is always well for the master to consult with such agents, before taking any steps towards selling, or repairing. But before surrendering the property to the disposal, and management of any such agents, the master should be careful to ascertain the exact authority of such agent, and see how far he is authorised to bind his principal.

* 5 Mason, 481.

If the agent exceed his powers, his principal may affirm or disaffirm his acts as subsequent facts may seem to be for his interest. If the acts of the agent are disaffirmed, and prove to be mere assumption of authority on his part, then he becomes the agent of the master, and the latter is responsible for his acts.*

The master, except in cases of great and urgent necessity, should never commit the management of business with which he is entrusted to the care of others, especially in case of shipwreck, or any other disaster, because the master, in all cases, is responsible for the fidelity of those whom he substitutes for himself.†

From the foregoing the master will see that his authority to sell the ship is derived entirely from that necessity which supercedes all laws. He will see, too, that no acts of his own, nor recommendation of others, can make the sale valid unless the *circumstances of the case* make it so. The report of the surveyors, then, he is to consider merely *advisory*, but still advice of the highest, and best, and perhaps the only kind that he should look to, as in any degree calculated to justify his future conduct, if regulated in accordance therewith.

When the master has once *rightfully* made sale of the ship, no subsequent acts of his relating to her can prejudice the owners, since from that moment

* Story on Agency, p. 115. † Ibid. pp. 14—16.

he becomes the agent of the insurers, and holds the funds derived from a sale of her, for their use and benefit.

Shipmasters will perceive, by a careful attention to the preceding rules, that the authority which they may have under certain circumstances to sell the ship is restricted within very narrow limits, and for the exercise of which they are held strictly accountable. They cannot delegate to others any power beyond that with which they are legally invested, consequently, no master can escape from the responsibility of a sale, by placing his business in the hands of another person, although that person may be a consul, or consular agent of his government. The popular idea, that whenever a vessel meets with difficulty abroad, the master may protect himself from accountability by calling upon the consul of his nation, and following his advice, is founded in error. Consuls, and consular agents are, generally, persons engaged in trade, and, too frequently, are governed by sinister motives in the advice which they give in such cases. It is always well for a master to acquaint them with his acts, and it is their official duty to give him counsel, and assistance, but he should not suffer himself to be made the mere instrument of their wishes. He should be governed by his own sense of right, with a single eye to the best interests of all concerned; and although it is impossible to lay down precise rules which will meet the exigencies

of every disaster, it may be said, generally, that the best course, is that which a prudent ship owner, if uninsured, would himself direct, if present.

For remarks on the duty of seamen, in case of the wreck of the vessel, see article, entitled, "duty of mariners in case of disaster," under the head of *seamen*.

OF THE MASTER'S AUTHORITY TO REPAIR THE SHIP AND FURNISH SUPPLIES.

THE principle is well settled that the master may procure *necessary repairs* to be put upon the ship, when abroad, at the expense of the owners. If the owners have money on board he should resort to that, before making the repairs upon their credit. If he has no *money of his own*, or of the *owners*, on board, and the vessel need repair, he may then procure them to be made, either upon the credit of the *owners*, or upon his *own* credit, or upon his and the owners *joint* credit; or, if in neither of these ways the necessary funds can be supplied, he may hypothecate the ship and freight.*

And if the necessary funds cannot be supplied by hypothecation of the ship and freight, the master may then resort to the cargo, as appears under the proper head. See "hypothecation of the cargo."

The repairs and supplies which the master is authorised to procure in a foreign port, are not

* Abbott, p. 100.

merely such as are *absolutely* necessary, but include all such as are *reasonably* fit and proper for the ship.*

But it is a matter of serious doubt whether the master has a right ro *resort to bottomry*, or the *sale of the cargo*, for the purpose of procuring any supplies, exeepting those of *absolute necessity*.

Where the master contracts for repairs he is always personally bound, unless he takes eare, by express terms, to confine the eredit to his owners only.†

If a speeial promise be made by the master, the owners are not holden; so if a speeial promise be made by the owners, the master is diseharged from any obligation. The obligation to pay, rests upon the person to whom the eredit was given. When the credit is given to the ship and freight, as in case of an hypothecation of her for repairs, the lender must look to her, and in case of her loss, lose his debt.‡

If the master uses his own funds for the repair of the ship, or for the purpose of furnishing necessary supplies, he has a lien upon the ship and freight for the advanees thus made.§

Not only the master, but also the eonsignee has authority to eause neeessary repairs to be put upon the ship consigned to him, at the expense of the owner.‖

* Ship Fortitude, Boston. † Abbott, p. 100. ‡ 11 Mass. R. p. 37.
§ 1 Peter's Adm. R. 223. ‖ 11 Mass. R. p. 38.

From the general liability of the master on all contracts made respecting the ship, and the necessity of his obtaining supplies for her use, arise his right to detain the freight, until he is fully paid his expenses and disbursements. To this extent it seems to be held that the master has a lien upon the freight, even against the owner.*

The master, if he wishes to hold the consignee, or owner of the cargo, for the amount of his disbursements for account of the ship, must give notice to the owner or consignee to that effect, with the amount of his claim.†

Where the master has either expended money on account of the ship, or incurred *liabilities* on her account, he has a right to insist upon collecting the freight, even in the home port, and in opposition to the owner. If the owner of the goods, after notice, pays over the freight to the ship owner, he is liable to the master to the amount of his claim for disbursements, if they do not exceed the amount of the freight.‡

Supplies furnished. The same principles that are laid down as to the right of the master to retain freight money, to the amount of his disbursements, for the *repairs* of the ship, hold good as to *supplies* furnished for the ship. They both stand on the same footing.

There must be a *reasonable*, though there may not be an *absolute* necessity for the supplies pro-

* 4 Mass. R. 91. † 7 Cowen, R. 679. ‡ Ibid.

cured by the master. Expenses incurred in arming the ship were held not to be a charge that could be enforced against the owner, except the case was one of urgent necessity.*

OF THE MASTER'S AUTHORITY TO HYPOTHECATE THE SHIP.

THE principle is well settled, that the master has a right to hypothecate the ship and freight, for the purpose of raising money to furnish supplies for, or to make repairs upon, her. But, before resorting to a hypothecation of the ship, the master should endeavor to raise the necessary funds upon the credit of the owner, or owners. If he has money of theirs on board, sufficient for his wants, he cannot hypothecate the ship, or freight. And, therefore, the master, before taking up money on bottomry, should assure himself that there is no other way in which he can raise the necessary funds. He ought first, certainly, to apply to the consignee for funds and direction, and this, too, even if the consignee resides at another port distant from that occupied by the vessel. If the distance be great, so as to make it *extremely difficult* to communicate with him, the master may proceed without his advice.

For further remarks on this point, see "maritime loans," and "hypothecation of the cargo."

* Ship Fortitude, Boston. 1 Johns. R. 106.

OF THE MASTER'S AUTHORITY TO HYPOTHECATE THE CARGO.

THE great object, which the master is bound to keep steadily in view, with respect to the cargo, is its *safe* and *speedy* conveyance to its destined port. In general, the master is a stranger to the cargo, any further than he is concerned in its safe custody and conveyance. But in cases of *unforeseen*, and *unprovided* necessity, the character of agent and supercargo is forced upon him, by the general policy of the law. If the ship has put into a port of necessity, in distress, and needs repairs to enable her to pursue her voyage, the master is bound to take the most prompt measures to hasten forward the cargo. But in this he is not entirely to lose sight of the interests of the ship owner. His first duty is to repair the ship, if practicable. If the ship cannot be repaired in season to carry on the cargo, or is so disabled as not to be worth repair, then his first duty towards the cargo is to tranship it, and send it on by another vessel, if one can be found in that, or a neighboring port. If no such vessel can be procured, or not without an ex-expense totally disproportioned to the advantages expected to be derived from sending the goods forward, then he may store them, or if they be of a *perishable nature*, he is bound to sell them. If, however, the vessel be capable of repair within a

reasonable time, he must repair, if the necessary funds can be procured

These funds he must first endeavor to obtain upon the credit of the owners. If they cannot be raised upon their credit, then, as has been seen, he may hypothecate the ship and freight. Or, if he fail in this, he may hypothecate the cargo, for the purpose of raising the necessary funds to make the repairs; or, if the funds cannot be obtained in this way, he may sell a *part* of the cargo. But, if the master resorts to an hypothecation of the cargo, he must hypothecate the *whole* of it, and not a part, as it is for the interest of the whole that it should go forward; and it must also be made in addition to the hypothecation of the ship and freight, as the latter is the proper fund, from which the loan should be paid.

It is, therefore, seen that the master cannot hypothecate the cargo, for the purpose of raising money to repair the ship, until he has first tried every other method, except a sale of it. When other means of raising the money has failed him he may resort to that.

The master is in no case authorised to sell more than a *part* of the cargo for the purpose of repairing the ship, and this he can do only in the *last resort.*

If the master sells a portion of the cargo, the foreign purchaser derives a good title to the goods; and the lender or respondentia has a valid claim

upon the cargo, or more properly speaking upon the owners of the cargo, to the extent of its value, provided it arrives safe.*

The principles which govern the contract of *respondentia*, are very much the same as those governing the contract of *bottomry*.

If the goods of A. are hypothecated by the master of a ship belonging to B., there is no liability incurred by A. beyond the value of the goods so pledged. If the goods are lost, the lender on bottomry, if he is not further secured by an hypothecation of the ship and freight, suffers the loss. But if the ship, goods, and freight of B. are hypothecated by the master, and the ship arrives without sea peril, the lender has not only a lien upon the property hypothecated for the repayment of his loan, but it also becomes a personal charge upon the owners.†

Maritime interest ceases at the termination of the risk. If payment of the bond is thereafter delayed, the holder can recover no more than the legal rate of interest for the use of the money.

The lender on respondentia, like the lender on bottomry, is entitled to his whole loan if the goods be lost by the *neglect or fraud of the owners or master*, or by the *unseaworthy state of the ship*, or her *unnecessary deviation* from the voyage designated in the bond. So, too, the lender does not

* The Gratitudine, 3 Rob. R. 240. 3 Mason, 255.

† 3 Rob. R. 240. 3 Mason, 255.

suffer by the deterioration of the goods on board from any *latent, inherent* defect. That loss must be borne by the shipper.*

By the general marine law, the lender on bottomry, or respondentia, is entitled to be paid out of the effects saved, so far as those effects go, if the voyage be disastrous.†

If the master has *sufficient* money belonging to the owners on board to make the necessary repairs, he cannot hypothecate the cargo. Or, if he has sufficient money of his *own* on board, he is bound to use it before hypothecating; and if he hypothecates the cargo, with money of his *own*, or of the *owners*, on board, the shippers of the cargo are not bound on the respondentia bond for an amount equal to the sum so retained on board.‡

If the master has money belonging to the *shippers* on board, there is no absolute rule requiring him to use it in preference to hypothecating the cargo. It is left to his discretion to act in such a case as he believes most for the advantage of the *shippers*.§

If the master be under the necessity of hypothecating the cargo for the purpose of repairing the ship, the *shippers* have a *valid lien*, not only upon the *ship* and *freight*, but upon any *goods* on board, belonging to either the *owners*, or the *master*, for

* 3 Mason, 255. Rob. R. 240.
† Kent. Com. 3 vol. 359.
‡ 3 Mason, 255.
§ 3 Mason, 255.

whatever sum they may have to advance towards discharging the loan thus created.*

It has before been said that the master should hypothecate the whole cargo, if any, so that all the shippers may equally bear the burthen of sending forward their goods. If, however, a *part* only of the cargo is hypothecated, courts of admiralty will compel the owners of the *remaining portion* to contribute towards the repayment of the loan, provided it is not promptly satisfied from the assets of the ship owners.†

See maritime loans.

OF THE OWNERS' AND MASTER'S RELATION TO THE CARGO.

Of the Charter Party.

THE contract by *charter party* is an agreement by which an entire ship, or some principal part of her, is let for the conveyance of goods, on a determined voyage, to one or more places. This mercantile lease of a ship describes *the parties*, *the ship*, and *the voyage*, and contains on the part of the owners a stipulation as to sea-worthiness, and as to the time when the vessel shall commence loading, and proceed on the voyage. It also contains the exception of the perils of the sea, for which the owners and master are not usually re-

* 3 Mason, 255. † Ibid.

sponsible, and such others as may be agreed on by the parties.

On the part of the charterer, it generally contains a stipulation to *load*, and *unload*, within a given time; with an allowance of so many *lay*, or *running* days for loading and unloading the cargo; and also the rates and times of payment of the freight, and rate of demurrage beyond the allotted days.

When the goods of several merchants, unconnected with each other, are laden on board, without any particular contract of affreightment with any individual for the entire ship, the vessel is called a *general* ship, because open to all merchants; but when one or more merchants contract for the ship exclusively, it is said to be a *chartered* ship. The ship may be let in whole, or in part; and either for such a quantity of goods by weight, or such a space in the ship.

Where the ship has been chartered for the carriage of goods in any of the above ways, certain duties and liabilities devolve upon the master and owners with respect to the subsequent proceedings under the charter party.

In the first place, it is the duty of the owner of the ship, not only to see that she is duly equipped and in a suitable condition to perform the voyage, but he is bound to *keep* her in that condition throughout the voyage, unless he be prevented by perils of the sea.*

* 3 Mass. R. 481.

The ship must be tight, staunch, and strong. She must be well furnished, manned, victualed, and, in all respects, equipped in the usual manner for the merchants' service in such a trade. She must be fit for the voyage for which she is engaged.

The owner of the ship is liable to the freighter, like a common carrier, for all losses happening to the goods, shipped on board, except those that are provided against by the exceptions in the charter party.

If the goods are lost by reason of any defect in the vessel, whether *latent* or *visible, known* or *unknown*, the owner is answerable to the freighter for the damage.*

The *owner* is also bound to see that the ship is furnished with all the requisite papers according to the laws of the country to which she belongs, and according to treaties, and the law of nations.†

If the charter party contains any stipulation on the part of the owner to keep the ship in good order during the voyage, the entire expense of the repairs requisite in the course of the voyage, are then to be borne by the owner.

The owner does not insure the cargo against the *perils of the sea.* He is, however, answerable for his own fault, or negligence, and also for the fault and negligence of the master and crew, or other

* 3 Mass. R. 485. † Kent, 3 vol. 205

agents employed in navigating the ship. In general he is answerable for all losses happening to the cargo, other than the excepted cases of the act of God, and public enemies.*

The responsibility of the owner begins where that of the wharfinger ends; and generally the owner's liability begins when the goods are delivered to the master, or any other accredited agent, either on the *wharf*, or on *ship board*.

If the owner has engaged that the vessel shall sail with convoy, and afterwards she sails without convoy, and that without consent of the freighters, the owner is liable for any loss happening from capture or detention.†

A merchant who ships goods on board of a vessel on freight, has a *lien* on the vessel for the loss of his goods, or any damage they may sustain from the *fault* or *neglect* of the master, or the insufficiency of the vessel.‡

For the liability of owners and charterers for repairs upon the ship, or supplies furnished to her use, see chap. 7, under the title, "*who are liable as owners.*"

The Charterer. The charterer is bound, on his part, to observe certain stipulations in the contract; one of which is that he shall not detain the ship beyond the *appointed* time, or if no time be

* Kent, vol. 2, lec. 40. † 3 Esy. N. P. R. 64.
‡ 6 Amer. Jurist, 5.

appointed, beyond the *usual* time to load the vessel, or to deliver the cargo.*

The extra days beyond the lay days, (being the days allowed to load and unload the cargo,) are called days of *demurrage*. Demurrage may become due either by the ship's detention for the purpose of loading, or of unloading the cargo, either before the commencement of the voyage, or during the voyage, or after the voyage, or while waiting for convoy.†

The money paid for such detention of the vessel is also called demurrage.

Both parties to a contract of affreightment, or *charter party*, are bound to be ready at the time appointed for the loading of the ship. If the ship owner be not ready, the charterer may avoid his contract, and seek another ship; or if the *charterer* be not prepared to put on board his goods, the *owner* may seek another *cargo*. This right arises from the necessity of precision and punctuality in all maritime transactions. By a very short delay the proper season may be lost, or the object of the voyage defeated.

OF THE BILL OF LADING.

In the execution of the contract of charter party, the master of the ship signs a bill of *lading*, which is an acknowledgment of the receipt of the goods

* Kent, vol. 3, p. 203. † Ibid.

on board, and that he has assumed the conveyance of them. The charter party is the contract for the hire of the ship, and the bill of lading for the conveyance of the cargo; and though it be signed by the master, he does it as agent for the *owners*, and it is a contract *binding upon them*.*

By the bill of lading, the master engages, as a common carrier, to carry and deliver the goods to the consignee, or his order; and, by the common law, owners were responsible for damages to goods on board to the full extent of the loss. In England they are now made liable, by statute, only to the value of the ship and freight; and this statute has been followed in Massachusetts, and probably in many of the other commercial states of the Union.†

There are commonly three or more bills of lading. One should in all cases be retained by the master, and two or more be delivered to the shipper; of which he should retain one, and forward the other to the consignee; one by the vessel herself, and one or more, by other conveyances.

The bill of lading is the evidence of title in the goods sent. If it be made *to order* or *assigns*, it is transferable in the market like a bill of exchange, or other negotiable instrument. The endorsement and delivery of it, transfers the property in the goods from the time of the delivery.

* Bewes Lex. Mer. 133. 142. † 2 Barn. & Als. 2.

OF THE CARRIAGE OF THE GOODS.

When the ship is hired, and the cargo laden on board, the various duties of the *owner*, and of his agent, the *master*, arise in respect to the commencement, progress, and termination of the voyage; which duties are extremely important to the interests of commerce, and have been well and accurately defined in the marine law.

When the vessel is ready to sail, the master is bound to proceed upon the voyage as soon as the wind and tide permit. If by the charter party the ship is to sail by a given day, the master must do it, unless prevented by necessity.*

So, if there be an undertaking to sail with convoy, he is bound to go to the place of rendezvous, and place himself under the control of the convoy, and continue, as far as possible, under their protection during its course.†

The master is bound, likewise, to proceed to the port of delivery without delay, and without any unnecessary deviation from the direct and usual course. If he covenants to go to a loading port by a given time, he must do it, or abide the forfeiture of the contract, if the charterer chooses to take advantage of his delay.

The master has no right to substitute another voyage for that agreed upon between the owner

* Kent, vol. 8, 209. † Ibid.

and the freighter. Such a power is entirely beyond the scope of his authority as master.

If, in the course of the voyage, the ship meet with tempestuous weather, and be obliged to seek an intermediate port, in distress, then a responsibility of no ordinary character may be thrown upon the master, requiring much judgment and discrimination. In ordinary cases the master is the agent of the ship owner only, and has nothing to do with the cargo, but in relation to its safe custody and transportation. But in case of disaster, the master may become the agent of the shippers for the protection and management of the cargo.

When a disaster has happened to the ship, so that the master has been under the necessity of putting into a port of necessity, the *first* principle that the master should bear in mind, is, that it is *his duty* to convey the cargo to the place of destination ; this is the purpose for which he has been entrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method.

Every act that is not properly and strictly in furtherance of this duty, is an act for which both he, and his owners, may be held responsible.*

If practicable, he must carry them forward to the port of destination in the ship on board of which the owner placed them, as that is the vehi-

* 5 Johns. R. 262.

cle in which, by contract, they were to be transported.*

For that purpose, if the vessel is capable of repair within a reasonable time, the master may detain the goods until the repairs are made, and then carry them on, and thus earn freight.†

If the master offers to send them forward by another vessel, and the merchant refuses, he will then be entitled to his full freight.

But if the goods are of a *perishable* nature, so that their detention for the time required to repair the ship, would work serious injury to the cargo, the master is *bound* to tranship them, if another vessel can be had in that or a neighboring port.‡

So, too, the master must tranship the goods, if the vessel be so far disabled as to be unfit for repair.

If the vessel is capable of being repaired, but the master is without the necessary funds required for the purpose, and cannot obtain the same on his own credit, nor the credit of the owners, nor by an hypothecation of the vessel and freight, one or both, he may hypothecate the whole of the cargo also; and if he cannot obtain the necessary funds by either of these steps, he may then sell a part of the cargo. But before proceeding to this extremity, (for nothing but the most extreme exigency can authorise this measure,) the master must have endeavor-

* 3 Rob. 240. 3 Mason, 255. † Ibid. ‡ Ibid.

ed, in vain, to raise the money upon his own credit, and that of the owners, the ship, and the freight. If in neither of these ways the money can be procured, and the master, in the exercise of a sound discretion, believes it to be for the interest of all concerned that the cargo should go forward, he is authorised to hypothecate the whole, or sell a part, for the purpose aforesaid.*

The master has no authority to sell the *whole* of the cargo for the purpose of repairing the ship, because it can never be for the interest of the merchant that the whole of his goods should be sold to assist in sending forward the ship empty. He can sell only a *part* of the cargo, for the mere purpose of repairing her. But if the master hypothecates the cargo, he should hypothecate the whole.†

If a portion of the cargo is sold at the port of necessity for the purposes of the ship, her owners must account with the owners of the cargo for the same; at its value at the port of destination.

If he hires another vessel for the completion of the voyage, he may charge the cargo with the increased freight arising from the hire of the new ship.‡

If another vessel cannot be procured to carry on the cargo, and his own vessel is not susceptible of repair, the master may *store the cargo, or sell it*, as the one or the other seems to him the most for the

* 3 Reb. R. 240. 3 Mason. 255. † Ibid. ‡ 5 Johns. R. 262.

interest of the merchant. Previous to selling the cargo, the master should communicate with the merchant, or his consignee, if practicable.

Great discretion is committed to the master, with regard to his authority over the cargo, when driven into port in distress, and beyond the aid or counsel of the merchant or consignee. He is to do with the cargo as a prudent owner might be expected to do, under like circumstances. No general rules can be given applicable to every case. What would be proper with respect to one cargo, might be improper with respect to another; the conduct proper to be adopted with respect to perishable goods, would, very probably, be entirely improper with respect to a cargo not perishable. One thing might be fit to be done with fish and fruit, and another with timber and iron; one method might be proper to be pursued in distant regions, another in the vicinity of the merchant; one in a frequented navigation, another on an unfrequented shore.*

If, upon arrival at an intermediate port, the master refuses to carry the goods on to their destination, he is not entitled to freight; and the owner may, under such circumstances, demand to receive them at such port without paying any freight.†

But it is otherwise if the ship owner is ready to carry forward the goods; and he may detain them while the ship is undergoing necessary repairs.‡

* 3 Rob. 240. 3 Mason, 257. † 5 Mass. R. 252. ‡ 2 Pick. 104.

In case of disaster, the freighter is bound to wait a reasonable time for the ship to be repaired, if the master requires it; but what is a *reasonable* time for the merchant to wait, is an inquiry not easily answered. It must be dependent upon the facts applicable to the place and the time, and the nature and condition of the cargo.*

If the master delivers up the cargo unnecessarily, in an intermediate port, to any other person than an authorised agent of the shippers, he is responsible for the acts of such person, and must make good any loss arising through his fraud, carelessness, or mismanagement.

If the directions to the master are to proceed to the port of *destination*, and *there* deliver the cargo to the supercargo, the master must not deliver it up to his management in an intermediate port. If he does, he is responsible for his acts.

The master must, in case of capture by a belligerent, contribute his exertions to rescue the property from condemnation, by interposing a claim, and exhibiting in support of it the documents with which he has been furnished for the protection of the cargo. If, by his negligence in the performance of this duty, the owner of the goods sustains damage, the master is responsible to him to the extent of the damage.†

Deviation. When the voyage is commenced, the master must pursue it in the most *safe, direct,*

* Clark vs. M. F. & M. Ins. Co. † 1 Johns. R. 364.

and *expeditious* manner. Any deviation from the *usual course* of the voyage, or any *unnecessary delay*, will avoid the policy of insurance upon the goods, and render the master and owners liable in damages. Stopping, or going out of the way to relieve a vessel in distress, to save lives, or to obtain supplies, or to avoid certain danger, is *not* considered a deviation so as to discharge insurers.*

A *departure* from the course of the voyage, *or a delay*, to *save property*, is considered a deviation; but if it is to *save lives*, it is not so; as all questions of mere property should yield to principles of humanity.

So if the ship unnecessarily deviates from the regular course of the voyage, and the cargo be injured by tempests during the deviation, the master is responsible for the loss, unless it can be shown that the same loss, not only *might*, but *must* have happened, had no deviation taken place.†

During the course of the voyage, the master is authorised, in case of a tempest, or other fearful peril, to throw overboard a portion of the cargo for the safety of the remainder; or he may be justified in throwing over the whole, where the safety of the lives of the passengers and crew demand it.‡

If the cargo be injured from any defect in the vessel, whether latent, or obvious, the master and owners are liable for the damage. If the damage

* Kent, 3 vol. 312. † 6 Bingham, 716. ‡ 3 Rob. R. 240.

arise from worms perforating the bottom, they are liable, unless the holes were made during the voyage.*

The master is bound, during the voyage, to take all possible care of the cargo; and, although he is not responsible for injury done to it in consequence of a leak occasioned by a storm, tempest, or other inevitable accident, yet, if a leak be occasioned by rats, and the goods be spoiled, the master has been held liable for the damage, because guilty of fault.†

But it was formerly held, that if there was a cat on board the ship, the master should not be deemed in fault.

OF THE DELIVERY OF THE GOODS AT THE PORT OF DESTINATION.

When the ship has arrived at her port of destination, the master must, as soon as he has reported himself to the Custom House and delivered his letters, proceed to deliver the cargo to the consignees. This is to be done in case the consignee produces the *bill of lading* and *pays*, or *secures the payment* of the freight.

The maxim of the law is, "that the ship is bound to the cargo, and the cargo bound to the ship;" that is to say — that if the *cargo*, during the voyage, is injured by the negligence or fraud

* Abbott, 224. † Ibid.

of the owners, or master, the shipper has a *lien* upon the *ship* to make good the loss; and if the freight upon the merchandise laden on board is not promptly paid, when safely arrived and ready for delivery at the port of destination, the ship owner has a *lien* upon it, and the master may retain it against every other person until the freight is paid.*

But the master cannot detain the goods *on board the ship* until the freight be paid, but must, if the consignee, or merchant, demand it, *unlade them*; for it is reasonable that the merchant should have an opportunity to examine the condition of them previous to payment.†

The master must, in the manner of delivering the cargo, have regard to the usage of the particular port in which the ship happens to be. One thing, however, the master is to bear steadily in mind, that his *lien* on the cargo for freight remains *no longer* than while it continues *in his possession.* After he has once delivered the property, the *lien* upon it for freight *is gone*, and he is left only to the usual remedies for the recovery of the debt. He cannot, by any act of his own, such as by taking the property again into his possession, *restore* the lien. He should, therefore, if he wishes to preserve the *lien*, be careful to do no act which may be construed into a delivery of the goods. He

* 6 East. 622.

† Abbott, part 3, chap. 3, sec. 10.

may send them under charge of his officers, or some agent, to the wharf, or store them until the matter is adjusted, when he will have a right to charge the expenses of storage, &c.

The general rule is, that delivery at the wharf (when there are no *special* directions to the contrary,) discharges the master. But this is to be understood with some qualification. There must be a *delivery* at the wharf to some one *authorised* to receive the goods; or *due notice* must have previously been given to the consignee of the time and place of delivery. The master cannot discharge himself by leaving them naked and exposed at the wharf.*

The master's responsibility continues until there is actual delivery, or some act that is equivalent, unless the owner, or his agent, has previously assumed the charge of the goods. This charge the consignee may assume by giving directions where to land them, by taking them into his own lighters, or by any other acts consistent with acceptance of, and care over, them.†

It was made a question by the court, in a case reported in 4 Pick. p. 373, whether the *consignee* was *bound* to receive the goods at all. No decision was had upon the point. It would always be well, however, in case of the refusal of the consignee to receive the goods, or to receive them at the particular place where left, for the master to

* Kent's Com., vol. 3. p. 215. † Ibid.

store them, or to *return them* again to the owner. If the master should leave them exposed on the wharf and damage ensue, he possibly might be rendered liable, notwithstanding notice was given to the consignee of the time and place of delivery.

If the consignee demands an examination of the goods before freight is paid upon them, to see that they have suffered no damage, &c., it is the duty of the master to unlade them, but to retain possession until the freight is adjusted.*

It is said to be the practice in England, for the master to take security from the merchants before he delivers the goods, for payment of *freight, primage*, and their proportion of the *petty average*.†

To whom the delivery shall be made. It is often difficult for the master to know to whom the cargo may safely be delivered. Sometimes the contest will be between the consignor and consignee, sometimes between the consignor and the *assignee* of the consignee.

In any case where two or more parties claim the custody of the goods, the master should not deliver them up, without first obtaining from the party receiving them a bond of indemnity, covering the value of the goods and all costs that may result from such delivery. Where the different claims are likely to be contested, the least vexatious proceeding is for the master to deposit the goods with some bailee, and apply to the court of Chancery to

* Abbott, p. 3, ch. 3. † Ibid. p. 7, ch. 3, sec. 11.

compel the contending parties to litigate their rights by an action between themselves.*

If the master is so situated as to be under the necessity of exercising his discretion about the delivery, and the bill of lading has not been *assigned over* by the consignee, and he has *failed*; without doubt the master should deliver the cargo to the person who claims for the use of the *consignor*.

If the consignor has endorsed bills of lading to two or more individuals, the master should deliver the cargo to the person to whom a bill of the lading was *first* endorsed.

In case the consignee becomes insolvent during the transportation of the goods, the consignor may stop them before they come to his hands, if the rights of no third parties intervene.

Goods lost in a lighter. If the goods are lost after the owner of them has taken them from the ship into a lighter, it is his own loss; but it is otherwise if the goods are sent from the ship by the ship's boat, which is considered a part of the ship and voyage. Yet if the owner of any goods sends his servant with them, the master, or lighterman, is not liable if they be lost.

If the vessel can be moored alongside of a wharf or quay, there is no difficulty; as the goods are then delivered to the wharfinger. But when she is obliged to discharge in a river, or open roadstead,

* Abbott, part 3, ch. 9, sec. 25.

and boats or other craft are employed in delivering the cargo, it is necessary to ascertain the custom.

In discharging the cargo, the master should take a *receipt upon the bill of lading* for the goods delivered.

The master is at all times bound to provide ropes, &c., proper for the actual reception of the goods on board, or for delivering them on shore; for if a cask, or other article, in hoisting it to or from the ship, or in lowering it into the ship's hold, accidentally fall and sustain injury, the master or owners of the ship must make good the loss.

OF THE RESPONSIBILITY OF THE SHIP OWNER.

WITHOUT some special agreement to the contrary, the owners are liable for *all losses* happening to the cargo, during the voyage, which are not included under the two well known exceptions, *act of God* and *public enemies*. Losses happening from the *act of God*, as understood and practiced upon, include all perils of the sea which could not have been prevented by human foresight and prudence. It is a loss happening in spite of all human effort and sagacity. It will therefore be seen that a destruction by the *violence of the winds or waves*, by *lightning*, *undiscovered rocks* or *shoals*, or a capture by *pirates*, are all causes which will excuse the owner for the non-delivery of the cargo.*

* 5 Term. R. p. 389.

It seems to have been held that the owners are liable for any loss to the shipper arising from the happening of a fire on board. This is undoubtedly true where the fire proceeds from the gross carelessness of those employed to navigate the ship. Fire occasioned by lightning, or spontaneous combustion, the ship owner is clearly not liable for.*

So, if the cargo be lost by means of the ship's running upon a rock, or sand bar, which is generally known, and the ship be not forced upon it by adverse winds or tempests, the owner is liable for the loss.†

But if the ship was forced upon such a rock or shallow by winds or tempests, or if the bar was occasioned by a recent and sudden collection of sand in a place where ships could before sail with safety, the owner is *not* liable for the loss.‡

The owner's liability, unless provided against, extends to all the *authorised*, or *unauthorised* acts of the master and mariners, by which the shipper may be injured in his property laden on board.

In Massachusetts, the ship owner is, by statute, only liable to the extent of his interest in the ship and freight, for losses occasioned by the negligence or fraud of the master or mariners. But without some statute to the contrary, the owner is liable to the full extent of the injury.§

* 1 Term R. p. 27.
† Abbott, part 3, ch. 4, sec. 1.
‡ Abbott, part 3, ch. 4, sec. 1.
§ Revised Statutes.

OF THE MASTER'S LIABILITY FOR BAD STOWAGE.

The master is liable for all injuries to the goods occasioned by bad stowage, for the master must see all things forthcoming that are delivered to his charge, *act of God, perils of the sea*, and *public enemies* only excepted.

In stowing the cargo, the master should allow sufficient for damage in the flat bottom, and in the bilges.

The master cannot stow goods on deck without the consent of the owner. If they are so stowed, without his consent, they are at the risk of the master.

OF THE DUTIES OF THE SHIPPER.

We do not intend here to speak of the duties of the shipper when he is the charterer, and reserves to himself the appointment of the master and mariners and the general control of the ship. He is then the owner for the time, and responsible as such.

Where the command of the ship is reserved to the owner, the merchant cannot detain her beyond the stipulated time, or employ her in any other than the stipulated service, and if he does he is liable in damages.

If the shipper puts on board prohibited or contraband goods, by means whereof the ship is sub-

jected to detention and forfeiture, he must answer to the ship owner for the consequences of the act.*

If the merchant declines to lade the ship according to contract, or to furnish a return cargo as he had engaged to do, he must render in damages due compensation for the loss.

OF THE PAYMENT OF FREIGHT.

The word "freight" is as often made use of in common conversation to denote the *cargo* with which the vessel is laden, as the *price* for the transportation of the same. But in legal language, *freight* is seldom mentioned in any other connection, than as the *price* of the carriage of goods. It is not used in this volume as denoting the cargo.

The price for the carriage of goods from one port to another is generally fixed by the charter party, or by special agreement between the parties. If, however, no such agreement is made, the shipper is bound to pay the customary price, as ascertained by the usage of trade and the reason of the case.

If the merchant hires the *whole* of a ship, or a *certain part* of her, for the voyage, he must pay the full price agreed upon, though he does not fully lade her. It is otherwise if he only agrees to pay in proportion to the goods shipped on board.

If the merchant engages to furnish a return cargo, and neglects to do it, and lets the ship return in ballast, he must make compensation to the

* 3 Johns. R. 105.

amount of the freight which such return cargo would have paid. This is termed *dead freight.**

If there be no express agreement in the case, the master is not bound to part with the goods, until the freight be paid. He should not, however, omit to offer to deliver the cargo upon a payment of the freight; and if the consignee demand it, to unlade it for his inspection.

When the regulations of the revenue require the goods to be landed, and deposited in a public warehouse, the master may enter them in his own name, and preserve the *lien*.

Where the *owner* of the ship *appoints* the master, he has a *lien* upon the cargo for the payment of the freight. But where the *merchant*, or *shipper*, *appoints* the master and mariners, and is the owner for the voyage, the ship owner has no lien on the cargo for payment of the freight.

So the master has no *lien* upon the cargo where the payment of freight is made payable at another, and more distant period, than that for the delivery of the cargo.†

The *lien* is as perfect where goods are laden on board of a *general* ship, as when laden under a charter party.‡

The consignee, if he accepts the goods, makes himself responsible for the freight, where the bill

* Roccus, note 72—75. † Kent's Com., vol. 3, p. 221.
‡ Ibid.

of lading stipulates for the payment of freight by such consignee.*

If the consignee, after receiving the goods, refuses, or is unable to pay the freight, the master still has his remedy over against the shipper on the charter party.†

If part of the cargo be sold on the voyage from necessity, the owner pays the value of the goods so sold at the port of delivery, deducting his freight for the whole voyage, equally as if the goods had arrived.

By the marine ordinance of France, as cited by Pothier, "no freight is due for goods lost by shipwreck, or running aground, pillaged by pirates or captured by enemies; and if there is not an agreement to the contrary, the master is bound, in such case, to restore that which may have been paid him in advance." The reason is, says Pothier, that affliction ought not to be heaped upon affliction; the shipper having lost his goods, it would be hard to make him pay freight; if he has had the enjoyment of the ship during the time she was occupied with his goods, it is an enjoyment which, through his loss, has proved useless to him.‡

If casks contain wine, rum, or other liquors, or sugar, and the contents be washed out, and wasted, and lost by the perils of the sea, so that the casks arrive empty, no freight is due for them; but if the

* 2 Camp. N. P. 587. 13 East. 399.

† Kent's Com. vol. 3, p. 222. ‡ Cushing's Pothier, p. 37.

loss arises from *defect* in the cask, *leakage*, or *inherent waste*, and not from bad stowage, the ship owner is entitled to freight.*

By the maritime ordinance, as cited above, it would seem that the merchant freighter should abandon to the ship owner, the casks, &c., on which freight is due, in consequence of leakage.†

Freight is to be paid on all live stock put on board, unless the animals die through some neglect or fault of the master. It is said, however, that an agreement for the "*transportation*" of the animals would require that they should be delivered at the port of destination; and, consequently, if any die on the voyage no freight is due.‡

If freight be paid in advance, and the goods do not arrive, the money so paid may be recovered back.§

The general rule is, that to entitle the ship owner to *any* freight under the charter party, the *whole* of the goods shipped on board must be delivered at the port of destination. The contract is an entire contract, and unless *fully* performed by delivery of the whole cargo, no freight is due under the charter party. The stipulated voyage must be actually performed. A partial performance is not sufficient, nor can a partial payment be claimed, except in special cases.‖

* 2 Johns. R. 327. Molloy, book 2, chap. 4, sec. 14.
† Cushing's Pothier, p. 34.
‡ Kent's Com. vol. 3, p. 225.
§ 3 Pick. 20.
‖ Kent's Com. vol. 3, p. 228.

Where a ship is chartered for one voyage, *outward and homeward*, and the sum agreed upon for the same is not apportioned, so much for the outward, and so much for the homeward voyage, but stands in gross, so much for the whole voyage,—the outward and homeward passages are not divisable. Therefore, if the ship performs the *outward*, and fails to perform the *homeward voyage*, no freight is recoverable for either.*

Where a ship was injured by collision with another ship, and deserted by her crew, and was afterwards picked up and brought into port and libeled for salvage, and the owners of the cargo received 50 per cent. of the value of the same, it was decided that nothing was due the ship owner for freight. The cargo actually arrived safe.†

There are special cases where an apportionment of freight is allowed. This usually happens when the vessel is forced into a port short of her destination, and cannot finish the voyage. In that case, if the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another ship, the master will be entitled to the whole freight; because the freighter is the cause of the contract not being performed.

But if the shipper consents, and the master refuses to go on, he is not entitled to freight, because he has not performed his contract. To entitle himself to freight, the master must proceed, or offer to

* 2 Chitty's Rep. 666. 5 Mass. 252. † 1 Johns. R. 24.

proceed, in another vessel, or repair his own, and take on the cargo.*

If the merchant accepts the goods at the intermediate port, the general rule of the marine law is, that freight is to be paid according to the proportion of the voyage performed, and the law will imply such a contract. The acceptance must, however, be voluntary, and not one forced upon the merchant.†

The proportion of freight earned, is not ascertained by a comparison of the length of the voyage from the port of lading, to the port of destination, with the length of the voyage actually performed; but the proportion is rather ascertained by the amount of benefit actually rendered to the shipper. Therefore, the expense of transporting the goods from the port of *distress*, to the port of *destination*, must first be ascertained, and that sum being deducted from the sum agreed upon for the whole voyage, the remainder is the sum properly due the ship owner for freight, *pro rata itineris*.‡

OF THE DUTY OF THE MASTER TO EMPLOY A PILOT.

It is the duty of the master engaged in a foreign trade, to put his ship under the charge of a pilot, both on his *outward*, and *homeward* voyage, when he is within the usual limits of the pilot's employment.§

* 2 Burns' Rep., 883.
† 2 Johns. R. 323.
‡ 5 Mass. R. 252.
§ Kent, vol. 3, p. 176.

If a master of a ship find himself, in tempestuous weather, in any reputed dangerous place, usually denominated *pilot's* water, and a pilot offer to come on board, which offer he refuses to accept, the master, in such a case, is liable to his owners, freighters, or insurers, for the damage or loss of ship and cargo, if either happen in his attempting a passage without a pilot.*

If the master at a foreign port attempt to obtain a pilot, and fail, and then in the exercise of his best discretion, endeavor to enter the port, and ground, the insurer is not discharged.†

If the master approach a port in the night, he must make signals for a pilot, and wait a reasonable time for one, and if he attempt to enter the port without one, except in case of extreme necessity, the insurers are discharged.‡

Where the approach or entrance to harbors, &c., is hazardous and difficult, the taking a pilot is obligatory on the master; otherwise, in case of loss, he must make it good.§

After a pilot is taken on board, the master has no longer any command of the ship till she is safe in the harbor; but then the master resumes the government of the same, and is to see to her bed and lying, the pilot being no longer liable, though for his own convenience he may still be on board.

* Blunt's Com. Digest, p. 324. † Barn. and Adolph, p. 380.
‡ Blunt's Com. Digest. § Ibid.

OF THE MASTER'S DUTY TO PROTEST IN CASE OF DISASTER.

A PROTEST should be made by the master in case of accident, either to vessel, or cargo, at the first port he puts into. Every occurrence, happening during the voyage, which *may* operate to the disadvantage, or detriment of any concerned in the voyage, should be protested against. This protest should be made within twenty-four hours after his arrival, at the next port after the happening of the disaster.

The master should note in his log book all the material occurrences which happened during the voyage. By this means much information may be thrown upon the events of the voyage, which afterwards may be subject to dispute or litigation. Care should be had, that no erasures are made, or leaves blotted, or torn; since all these circumstances tend very much to excite suspicion of alteration, and weaken confidence in its correctness.

Masters of American vessels must make a protest when any of their seamen have been impressed, and transmit the same to the nearest consul, or the minister of the United States, and keep a duplicate for the Secretary of State.

OF THE MASTER'S DUTY RESPECTING A COLLISION OF SHIPS.

THE facts, in case of a collision of vessels, are generally difficult of ascertainment, and therefore it is often hard to decide who is the party in fault. Such accidents usually happen in the darkness of night, or in a storm, and are necessarily accompanied with confusion and agitation. But when the facts are once ascertained, the principles upon which the loss is to be adjusted is very well settled by the maritime law. The party in fault must pay all the damages; and that, too, whether it arose from actual, wilful intent to injure, or, from heedlessness, or want of due care and skill in the management of the vessel.

There are settled nautical rules by which, in most cases, the want of skill, care, or duty may be ascertained.

The vessel that has the wind free, must get out of the way of the vessel that is close hauled.

The vessel on the starboard tack has a right to keep her wind, and the vessel on the larboard tack is bound to bear up, or heave about to avoid danger, or be answerable for the consequences.

The vessel to windward is to keep away when both vessels are going the same course in a narrow channel, and there is danger of running afoul of each other.

In the case of steam vessels, which have greater power, and are more under command, they are bound always to give way to a vessel with sails, in a case of collision.

So, a neglect of due means to check a vessel entering a river or harbor, where others lie at anchor, is a fault which creates responsibility for damages which may ensue.

Where the collision has arisen from causes over which neither party could have had any control, and without any fault, open or concealed, the damage must be borne where it falls.

When both parties are equally in fault, or where the causes of the collision are undiscoverable, then both vessels contribute equally to repair the loss without respect to the relative value of the injured vessels.

By a late decision in the English House of Lords, it would seem to be held that the cargo is liable to contribution in case of loss by collision, and, also, on the other hand, entitled to share in the salvage.

In Massachusetts, by special statute, the owner s made answerable only for the wrongs and defaults of his master or crew, to the extent of his interest in the ship.

For article on "deviation by the master," see article on "deviation," under the head of "marine insurance."

CHAPTER XII.

OF THE MATE.

In the absence of the master, the mate is entrusted with the care of the ship, and the government and management of the crew; and if a seaman be wrongfully dismissed by him, the owners are liable therefor as the act of their agent.*

Upon the death of the master the mate succeeds to his place by force of his office, and by operation of law. He acts instead of the master, in all cases where the latter is dead or absent. He does not cease to be mate in such cases; but he has thrown upon him, cumilatively, the duties of master. He is still a mate, acting as master, and may sue for his wages as mate in the admiralty.†

But in case of the death, or other removal of the master abroad, the mate cannot claim to exercise the authority of master as an incident to his office. The master may appoint some one else to succeed him; or the American consular agent, or consignee of the owner, each, in the absence of the other, have a right to select his successor.

The mate is, in sickness, entitled to be cured at the expense of the ship, in the same manner as

* 4 Mason's R. 541. † Sumner's R. 151.

a seaman. And, therefore, if he is put on shore, from sickness, for the convenience of the ship, his expenses for medicines, advice, attendance and board, are to be borne by the ship owner.

The mate may forfeit his right to command and wages, by fraudulent, unfaithful, and illegal practices; by gross and repeated negligence, or flagrant, wilful, and unjustifiable disobedience; by incapacity brought upon him by his own fault, or palpable want of skill in his profession; but the causes of removal should be evident, strong, and legally important.*

Where a master and mate were jointly sued in the admiralty by a seaman for an assault and battery, and it appeared that the mate assisted in some of the acts complained of; held, that the mate might be justified for assisting, in obedience to the master's orders, though the conduct of the master might have been, on the whole, illegal and unjustifiable; and that the libel, in such a case, might be dismissed in respect to the mate, and he be made a witness for the master.†

When a seaman is appointed to act as mate of a vessel, by the master, during the voyage, he may be removed by the master for incompetency, and is not entitled to any other wages than those contracted for in the articles.‡

It seems, that temporary appointments, made by the master, on an emergency, are held at his pleas-

* 4 Wash. R. 338. † 7 Amer. Jurist, 70. ‡ Gil. R. 83.

ure and stand on a different footing from that of a party originally shipped in the character in question, making his contract for the office and for the wages belonging to it.

In the absence of the master, the next highest officer on board succeeds to his rights and authority for the time, so far as they are necessary for the due performance of the ship's duties.

The master and mate, as well as the seamen, are entitled to medical advice and attendance, at the expense of the ship. If they are put on shore from sickness, for the convenience of the ship, their expenses for medicines, advice, attendance and board, are to be borne by the ship owner.*

Neither the mate, nor any subordinate officer, has authority to punish any seaman even for improper behavior, or misconduct to himself personally, when the master is on board, except by the authority, expressed or implied, of the master, or when the necessities of the ship's service require *instantaneous* punishment, to compel a seaman to do his duty.

* 3 Gilpin's R.

CHAPTER XIII.

OF SEAMEN.

Of seamen—Of laws for their protection—Of laws for their relief in American ports—Of laws for their relief in foreign ports—Of medicine and medical advice and attendance—Of provisions and water—When mariners may refuse to proceed on the voyage—Of seamen's wages—Of their liability to forfeit their wages—Of their liability to lose their wages—Of their duty in case of disaster—Of State laws relating to seamen—Of embezzlement by seamen.

SEAMEN are a peculiar class, and have their own peculiar characteristics. Perhaps there is no other class among us, so strongly and distinctly marked. The natural effect of their home on the deep, with its unchanging scenery, unless broken by the tempest, and its regular routine of duties, except when interrupted by calamity, is to assimilate their characters to each other in a remarkable degree. There is connected with their calling peculiar dangers, privations and sufferings; and they have their own peculiar habits, and manners, and distinctive modes of thought, of feeling, expression and of action. They are thrown by their situation under different influences from other men, and exposed to different temptations. They are generally less favored than others with the advantages of education; and by their position, are rendered less likely to become familiar with the formalities and stratagems of the world.

Hence it is that they are scarcely to be judged by the same rules as other men, nor their errors and foibles weighed in the same balance. They are, therefore, not only provided with special laws for their government and protection, but the rules by which they are judged, in the admiralty courts, are more flexible than those adopted for any other class. In these courts, where suits by them for their wages, or against them for their offences, are cognizable, they have usually found watchful and firm guardians, suited to their character and wants. Indeed, they have been termed the peculiar favorites of maritime courts. Their thoughtlessness and improvidence, combined as it is with much of merit and of gallantry, is forever exposing them, either to the arts of the designing or to the bitterness of privation and suffering. They are seldom fully aware of their own rights and privileges, and too often indifferent to their true value. Hence it is in the admiralty courts, where alone equity powers are possessed fully adequate to their wants, that seamen can look for even-handed justice and protection. The rules and the precedents of the common law-courts, though well adapted to the character and wants of other men, are scarcely so to them.

The character and wants of seamen are now every day becoming more fully and better understood, and their rights are beginning to become a topic for frequent and serious remark. It is to be

hoped that this spirit of inquiry into their rights and grievances, will not only continue, but be productive of much good. A great object has been gained when you have put any class upon the inquiry as to what their rights are. There is but little fear but that when once ascertained they will uphold and defend them.

The national legislature has wisely and humanely seconded this watchful guardianship of the rights and privileges of seamen by the admiralty courts, by passing numerous and salutary laws calculated to protect them, not only from the cruelty or cupidity of the master, or owners, but also from their own improvidence on a home shore, and from the accumulated sufferings of disease and poverty in foreign ports.

OF LAWS FOR THE PROTECTION OF SEAMEN.

Every American seaman may, upon application to the collector of the district from whence he departs, and upon producing proof of his citizenship, obtain a letter of *protection*. He is entitled to this certificate by application as above, and by paying 25 cents.

It is the duty of the master of the vessel, whose crew, or any of them, have been impressed or detained by a foreign power, at the first port at which he arrives after such impressment, if it happen upon the high seas, or, if it occur in port, then, imme-

diately upon such impressment or detention taking place, to make a protest and transmit it to the nearest American minister or consul. He should reserve to himself a duplicate copy of the protest, and immediately upon arriving in the United States, he must transmit the same to the Secretary of State. In case the protest is made in the United States, or in a foreign country where no American minister, consul or agent resides, then the same must, as soon thereafter as practicable, be sent by mail or otherwise, to the Secretary of State.*

If the master neglect to notify as above in case of the impressment of any of his seamen, he is liable to forfeit and pay $100.

OF LAWS FOR THE RELIEF OF SEAMEN IN AMERICAN PORTS.

Masters of vessels are authorised by law to retain twenty cents per month out of the wages of the seamen in their employ, for hospital money.†

The fund thus raised, is appropriated to the establishment and maintenance of hospitals for sick and disabled seamen. The money thus retained by the master is paid into the hands of the several collectors, and by them quarterly returns must be made of the sums thus collected, into the office of the Secretary of the Treasury. This fund, when thus collected, is at the disposal of the president of the United States for the purposes above expressed.

* Act 23d May, 1796, sec. 4. † Act 16th July, 1798, sec. 1.

Directors are appointed in the several ports of the United States, where the president thinks proper, who have the direction of the expenditure of the fund assigned for their respective ports.

Where it can with convenience be done, directors of the Marine Hospitals, within the United States, are required to admit into their respective hospitals sick *foreign* seamen, on the application of the master of any foreign vessel to which such seamen may belong; and such master is bound for the payment of the hospital expenses thus incurred. No clearance will be granted him until such payment is made.

See article on "Marine Hospitals," also on "Medicine, and Medical Advice and Attendance."

OF LAWS FOR THE RELIEF OF AMERICAN SEAMEN IN FOREIGN COUNTRIES.

When a vessel is sold in a foreign country, and her company is discharged; or when a mariner, a citizen of the United States, is, with his own consent, discharged in a foreign country, the seaman so discharged, is entitled to two months pay, over and above the wages then already earned on board. This pay he obtains by application to the American consul for the port where such discharge is made.*

American seamen in foreign ports, who are sick, or in destitute circumstances, are entitled to re-

* Act 28th Feb. 1803, sec. 3.

ceive, upon application to the consular agent of their government for the port where they may happen to be, suitable food and assistance; and they are also entitled to have a passage provided for them to some port in the United States.*

Where the master of a vessel, in a foreign port, where no American consul or other government agent resides, takes a distressed American seaman on board and returns him to the United States, the Comptroller of the Treasury has power to award him a suitable and equitable compensation, in addition to the compensation now fixed by law.†

If a seaman is discharged abroad without his own consent, he may follow the vessel and recover wages up to the time of her arrival in a home port, and also the expenses of his own return. His intermediate earnings may be deducted from the expenses incurred, but not from the wages due.‡

The whole policy of the laws of the United States, discourages the discharge of American seamen in foreign ports.§

A consul has no authority to order a seaman to be imprisoned in a foreign port. If the master does it on his order, he is not exempt from liability if the imprisonment was unjustifiable.

For right of seamen to medical advice and attendance when sick or disabled in a foreign port,

* Act, 28th Feb. 1803, sec. 4.
† Act, 1811.
‡ 7 Amer. Jurist, 37.
§ 7 Amer. Jurist, 37.

see article, "*Medicine and Medical Advice and Attendance.*"

OF MEDICINE, AND MEDICAL ADVICE AND ATTENDANCE.

By the maritime law, both of Europe and America, the expense of curing a sick seaman, is made a charge upon the ship; "and it appears to me," says Mr. Justice Story, "so consonant with humanity, with sound policy, and with national interests, that it commends itself to my mind quite as much by its intrinsic equity, as by the sanction of its general authority. Seamen are, by the peculiarity of their lives, liable to sudden sickness, from change of climate, exposure to perils and exhausting labor. They are generally poor and friendless, and if some provision be not made for them in sickness at the expense of the ship, they must often, in foreign ports, suffer the accumulated evils of disease and poverty, and sometimes perish for the want of suitable nourishment. Their common earnings, in many instances, are wholly inadequate to provide for the expenses of sickness, and if liable to be so applied, the great motives for good behavior might be ordinarily taken away, by pledging their future, as well as past wages, for the redemption of the debt. On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seaman. The master will watch over their health with vigil-

ance and fidelity. He will take the best methods, as well to prevent diseases as to insure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty combining with that of the owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency."

The master and mate, as well as the seamen, are entitled to medical advice and attendance at the expense of the ship. If they are put on shore from sickness, for the convenience of the ship, their expenses for medicine, advice, attendance and board, are to be borne by the ship owner.*

Seamen are to be cured at the expense of the ship, of any sickness, or injury, sustained in the ship's service.

It must be sustained by the party while in the ship's service, and he is not to receive any compensation or allowance for the effects of the injury.†

Where a seaman, in a foreign port, is taken on shore at his *own solicitation*, from a vessel *properly provided with a medicine chest*, and there receives medical advice and attendance, the expenses thereof are to be deducted from his wages.‡

Every ship, or vessel, of the burthen of seventy-five tons or upwards, navigated by six or more per-

* 2 Mason, 541. Gilpin's R. 485. † Sumner's R. 195.
‡ Gilpin's R. 435.

sons in the whole, and bound on a voyage without the limits of the United States, must be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and such medicine must be examined by the same, or some other apothecary, once at least, in every year, and supplied with fresh medicines in place of such as have been used, or spoiled. In case the master fails to provide such medicine-chest, and to keep it fit for use, he must provide and pay for, all such advice, medicine, or attendance of physicians as any of the crew may, in case of sickness, stand in need of, at every port or place where the vessel may touch or trade at during the voyage, without any deduction from the wages of any such sick seaman or mariner.*

A stipulation that the seaman shall pay for medical advice, and medicines, without any condition that there shall be a suitable medicine-chest, &c., is void, as contrary to the act of Congress.†

OF PROVISIONS AND WATER.

Every vessel, bound on a foreign voyage across the Atlantic, must, at the time of her leaving the last port whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one

* Act 2, March, 1805. † 2 Mason, 541.

hundred pounds of wholesome ship-bread for every person on board such vessel, over and besides such other provisions, stores, and live stock, as may, by the master, or passengers, be put on board; and in like proportion for shorter or longer voyages.

In case the crew of any vessel, not so provided, are put on short allowance of water, flesh, or bread, during the voyage, the master or owner of such ship or vessel, is liable to pay to each of the crew one day's wages beyond the wages agreed upon, for every day they are so put on short allowance.

Where the provisions specified in the act of Congress, to be put on board the vessel, can be procured, no substitute can be allowed; but where the specific articles cannot be obtained, others may be substituted. When the requisite quantity is taken in, the master is the sole judge of their expenditure. If the voyage is likely to be uncommonly procrastinated, or, if provisions are, by accident, diminished in quantity, he may justifiably diminish the usual allowance. There is not the shadow of reason to complain, where other provisions are substituted for enumerated articles damaged.*

WHEN MARINERS MAY REFUSE TO PROCEED ON THE VOYAGE.

That the lives and comfort of mariners may not be exposed unnecessarily by the carelessness or cu-

* 1 Admiralty Decision, 219.

pidity of their employers, by placing them on board of vessels unseaworthy, or, unprovided with suitable stores, it is provided in certain cases that the crew may compel the master to put into port for repairs, or to obtain farther supplies.

By the act of the 20th July, 1790, it is provided that, if the mate or first officer under the master, and a majority of the crew of any vessel, bound to a foreign port, shall, after the voyage has begun, (and before the vessel has left the land,) discover that she is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores, to proceed on her intended voyage, they may require of the master that the same be inquired into. The master, upon such request, must forthwith proceed to, or stop at the nearest port or place where such inquiry can be made, and must there apply to the judge of the district court, if he reside there, or to a justice of the peace, taking two of the seamen who complained with him, and upon such application, the judge or justice must issue his precept to three disinterested men skilled in such affairs, to repair on board and examine her in respect to the deficiences complained of, and to make report to him, in writing, whether in any, or what respect she is unfit to proceed on her voyage, and what addition of men, provisions or stores, or what repairs are needed to render her fit to proceed on the voyage. Upon the report thus made, the judge must determine and endorse on the report his judg-

ment, whether the vessel is fit to proceed on the intended voyage or not; and if not, also whether she can be refitted where she then is, or must return to the port from which she originally departed. This judgment must be strictly followed by both master and crew. The master must in the first instance pay all the costs and charges of such view, report and judgment.

If the complaint of the crew appear upon such judgment to be without foundation, then the master may deduct the amount of such costs, and also reasonable damages for such detention (to be ascertained by such judge or justice, from the wages growing due to such complaining seamen.

If, after such judgment, such vessel is fit to proceed to sea; or after procuring such provisions, stores, men, or repairs, as may be directed, the seamen, or either of them, refuse to proceed on the voyage, any justice of the peace may commit such seaman or seamen to the common jail of his county, there to remain without bail until he or they shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as may be allowed by the justice, and the surety of such seaman (in case he may have given any) must remain liable for such payment.

No seaman thus committed can be discharged upon any writ of habeas corpus, or otherwise, until such sum be paid by him, or his surety.

When seamen have shipped on board of any vessel under a particular master, and afterwards another master is substituted in his place, such seamen have no right to leave the ship and refuse to perform the voyage for that reason alone. But if the master so substituted is grossly incompetent to fulfil the duties of his station, from want of skill, or bad habits, or profligate and cruel behavior, the seamen may be justified in refusing to do duty, or to remain by the ship.

OF SEAMEN'S WAGES.

To prevent all embarrassment in ascertaining the exact condition on which seamen contracted for the voyage, it was early enacted by statute, that a contract in writing, or in print, should be made with every seaman on board of any vessel of the burthen of fifty tons or upwards, and bound to any other than a port in the same, or an adjoining state. In this contract must be declared the voyage, and also the term of time for which each seaman shipped, as well as the amount of compensation.*

If the master carries out any seaman without such written, or printed agreement, he is bound to pay to such seaman the highest wages which was given for a similar voyage, within the three months previous to such shipping; and also forfeit for every seaman thus carried out, the sum of $20.

* Act 20th July, 1790, sec. 1.

Seamen who have not signed the shipping articles, are not bound by the regulations, nor subject to the penalties provided in an act passed in 1790, chap. 7, sec. 56, for the government and regulation of seamen in the merchant's service.*

Every seaman may demand from the master of the vessel to which he belongs, one third part of the wages which are due to him, at every port at which the vessel unlades a part of her cargo, unless the contrary be expressly stipulated in the contract.†

As soon as the voyage is ended, and the cargo or ballast is fully discharged at the last port of delivery, he is entitled to the wages then due him according to his contract; and if such wages are not paid within ten days after the discharge of the cargo as aforesaid, the seaman may commence a process against the master to compel payment.

If the vessel be about to proceed to sea before the ten days have expired, the mariner may proceed against the vessel immediately.

Seamen have a threefold remedy for the obtainment of their wages—to wit: against the master, the owner, and the ship.

They are favored in another respect, inasmuch as they are privileged by law, to bring their suit jointly, the whole crew joining in one action, and thus preventing the accumulation of costs which would ensue from the suits being brought severally.

* Act 20th July, 1790, sec. 2. † Ibid, sec. 6.

After the ten days have expired, if the master refuse to pay his seamen, their proper method to obtain payment, is, to apply to a judge of the district where the vessel lays, or in case no such judge resides within three miles, then to a justice of the peace, with a statement of their several claims; whose duty it is immediately thereafter to issue a summons to the master thus complained against, to appear and show cause why process should not issue against the vessel, her furniture, tackle and apparel, according to the usual course of admiralty courts.

If, when so summoned, the master neglect to appear, or appearing, fail to satisfy the judge or justice, that the wages thus claimed are not due, or that the same have been paid, satisfied or forfeited, it is the duty of the judge or justice, if the same are not forthwith paid or satisfied, to certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process; and thereupon the clerk of the district court will issue process against the vessel, &c.

If the master, upon the trial, or upon any hearing touching their wages or conduct, refuse, upon application, to produce the log book, the seamen are permitted to state what the same contains, and the master cannot disapprove what the seamen thus state, otherwise than by producing the log book.

As a seaman is exposed to the hazard of losing the reward of his faithful services during a consid-

erable period, in certain cases, so on the other hand the law gives him his whole wages, even when he has been unable to render his services, if his inability has proceeded from any hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage.*

If, in consequence of their sickness, they are obliged to be left at a foreign port, they are still entitled to their wages for the full voyage.†

If, by threats, the crew induce the master, while on the voyage, to promise them higher wages than those for which they contracted, the promise will be held to be void.‡

If the master, in violation of his contract, discharge a seaman from the ship during a voyage, the seaman will be entitled to his full wages up to the prosperous termination of the voyage, deducting, if the case require it, such sum as he may in the mean time have earned in another vessel.§

When seamen are discharged by their own consent abroad, or the ship is sold abroad, they are of course entitled to their wages up to that time; and the act of Congress of 28th of Feb. 1803, ch. 62, provides that three months additional pay shall be allowed, two thirds of which are to be given by the consul of the United States to the seamen, and the other third is to be retained by the consul as a fund to aid sick and distressed seamen.

* Abbott, 441.
† 2 H. Bl. 606.
‡ 14 Johns. 260.
§ 3 Johns. R. 518.

In case of a seaman's dying in the course of the voyage, his representatives are entitled to his wages up to the time of his death.*

A father is entitled to the services of his minor children. He may, therefore, recover in the admiralty for wages earned by such children by maritime services.†

The written agreement, or shipping articles, entered into at his departure, is the only legal evidence of the contract, and a mariner can recover no more than is stipulated in these articles.

OF THE LIABILITY OF SEAMEN TO FORFEIT THEIR WAGES.

One of the means by which seamen are sought to be bound to the ship, and made to feel the success of the voyage to be identical with their own, is the liability which the law acknowledges, of their forfeiting their wages to the owners for their misconduct; or of losing them, by the loss of the ship. That these regulations are founded in good policy, no one who considers the character of maritime engagements can seriously question. By making the payment of their wages dependent upon their conduct, a steady and healthful influence is constantly operating upon them, and that, too, at times, and in places, where no other motives would

* 12 Mass. R. 576.

† 4 Mason, 380.

be likely to be regarded; and the making the loss of the ship the certain loss of their wages, secures more effectually than could any other thing, the united and active assistance of the crew to save the ship in time of peril, when otherwise they might be inclined to shrink from duty. But while the law visits upon seamen the forfeiture of their wages for disobedience and mutiny, it is only those offences which are "gross, and obstinate, and persisted in without repentance and amends," that are punished thus severely; while lighter faults are treated with an indulgent lenity, allowing compensation for any losses and expenses caused by them; passing over slight errors, unaccompanied with mischief, without notice, and correcting habitual neglect, or incompetent performance of duty, when it amounts only to minor faults, by a correspondent diminution of wages.

If a seaman belonging to a vessel, absent himself from on board without leave of the master, or officer commanding on board, for more than *forty-eight hours*, at one time, he forfeits all the wages then due him.

If he thus absent himself for a *less* time than forty-eight hours, he forfeits *three days* for *every day* he absents himself.

In case he deserts from the ship for more than *forty-eight hours*, the mariner not only forfeits his wages, but also his goods and chattels on board, or in store where he may have deposited them on de-

sertion; and is liable to pay all *damages* sustained by the owners, by reason of their being obliged to hire other mariners in his place.*

The officer having command of the log book must make an entry in it of the name of the absentee, with the time of his desertion, on the day it takes place. Without such entry, the seaman can recover for his wages.

It is incumbent upon the master, or commander, to produce the contract, and log book, if required by the mariner for the ascertainment of any matter in dispute; and if he refuse so to do, the mariner will be permitted to say what is the contents of such contract, or log book, and the master will not be allowed to contradict him.

It is provided by law, that at the foot of every shipping paper there must be made a memorandum of the day and hour on which the seamen must render themselves on board. If any seaman, after subscribing such shipping paper, and receiving his month's advance, neglect to render himself on board to begin the voyage on the day and hour specified, he forfeits for *every hour* he so neglects to render himself, *one day's pay* to be deducted from his wages.

If he wholly neglect to render himself on board, or, after rendering himself on board, desert, so that the vessel proceeds to sea without him, he forfeits,

* Act 20th July, 1790, sec. 5.

and is liable to pay to the master or owner, a sum equal to that paid him in advance, in addition to the sum so advanced.*

Seamen forfeit their wages for gross offences, but not for slight faults, either of neglect or disobedience. There must be either an habitual neglect or disobedience, or a single act of a heinous and aggravated nature.†

Repentance and tender of amends, reinstates the offender's claim for wages.‡

The master has power to remit the forfeiture of the wages of any seaman under his command, and such pardon by him cannot be questioned by the owners afterwards.§

Wages forfeited for an offence are only such as are earned *antecedently*, and not *subsequently* to the offence.‖

Neglect of duty on the part of seamen, or disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during a voyage, will also deprive him of his wages. But the neglect of duty and disobedience of orders, it seems, must be continued and obstinate, to subject the offender to so severe a penalty.¶

Desertion of one of the crew during the voyage is, by the maritime law, a forfeiture of all wages

* Act 20th July, 1790, sec. 2.
† 4 Mason, 84.
‡ Ibid.
§ 4 Mason, 84.
‖ Ibid.
¶ Ibid. 541.

antecedently due. But a desertion, to work this effect, must be not only an absence without leave, or in disobedience of orders, but a going away with the *intention* to abandon the ship and the service.

If, after desertion, a seaman offer to return to duty in a reasonable time, and offer amends, and repent of the offence, the master is bound to receive him back, unless his previous misconduct would justify a discharge.*

The contract of seamen is not dissolved by shipwreck; but they are bound to labor to preserve the wreck of ship and cargo; and if they leave the ship without endeavoring to save them, they desert their duty and may forfeit wages antecedently due.

Desertion to bring after it the forfeiture of wages, either by the maritime law or by the statute, must be during the voyage, and before it is ended.

The due entry in the log book is indispensable to inflict the statute forfeiture. If not made on the very day of the absence there can be no forfeiture inflicted.†

Both officers and seamen are bound to remain by the ship and unlade the cargo. If they do not, they are liable for damages, and a compensation to the owner.

If a person be substituted as master to take the place of the commander under whom the seamen shipped, who is grossly incompetent to fulfil the

* 4 Mason, 84.

† 1 Sumner, 373.

duties of his station from want of skill, or bad habits, or profligate and cruel behavior, the seamen may be justified in refusing to do duty, or to remain by the ship.

Where a vessel is detained in port by the wrongful absence of a seaman, a deduction from his wages may be made to the amount of loss actually sustained.

Where a vessel arrives at the last port of delivery, and is moored at the wharf, if a seaman leaves her before the discharge of the cargo, a deduction from his wages is allowed, but not a forfeiture of the whole. So, also, when the vessel is detained by his refusal to work.

A seaman does not forfeit his wages by refusing to proceed on a voyage not designated in the shipping articles.

The contract of the master with a seaman is for his services until the cargo is discharged; and if be leaves the ship before that time, he forfeits his wages.*

The time allowed by law for unlading vessels of over 300 tons burthen is 20 days; and all vessels of less burthen, 10 days. It is probable no seaman would be required to remain longer by the ship, for her unlading, than the time allowed by law for the unlading of the vessel.

* 13 Johns. R. 390.

OF SEAMEN'S LIABILITY TO LOSE THEIR WAGES.

It has ever been the policy of all maritime nations to identify the interests of the seamen with the prosperity of the voyage. To make the payment of their wages to depend on its successful termination. From the nature of the employment they must, necessarily, often be engaged in very perilous services. Perhaps, at such times, no other inducements would operate so strongly towards making them do their whole duty, as the fact, that on the issue depended their title to their past earnings. So important has this principle been considered in the highest maritime courts, that seamen's wages have been judicially settled not to be legal subjects of insurance. Any insurance upon their wages is considered void in law, as contrary to its policy, and as tending to subvert the very wholesome rule, that freight is the mother of wages.

The seamen lose their wages when the vessel earns *no* freight. This may happen by her being totally lost or captured.* Freight is said to be the mother of wages; but if the ship is lost by the fault or fraud of the master or owner, the seamen are entitled to their wages.†

Where the ship is disabled, and she puts into an intermediate port, and the cargo is there accepted,

* Abbott, p. 457, notes. † 3 Johns. R. 518.

and the vessel earns a portion of her freight, then the seamen are entitled to a like proportion of their wages.*

In case of capture, if the seamen stay by the ship at the request of the master, and she be released, they recover their wages for the whole voyage; but if the ship be condemned, they *lose* their wages. While they stay by the ship, however, waiting, at the request of the master, for her release or condemnation, they are entitled to their subsistence.†

But if a loss by capture, or by being run down, takes place, and the owner recovers of the insurers, or of the vessel running her down, still the seamen cannot recover for their wages.‡

Where a ship, upon a double voyage, earns one freight, or more, but is lost while earning the other; in the adjustment with the crew, they are to be paid for their time up to the last port where freight was earned, and for half the time while the ship lay in said port.§

Or, if the ship go in ballast to another port after a cargo, and after taking in a cargo and proceeding on her voyage, be shipwrecked, the seamen are entitled to wages up to the arrival, and half the time the ship lay at the port of lading.‖

When a vessel is captured, the master has no longer any control over the seamen. The relation

* 2 Sumner, 443. † Ibid. ‡ Abbott, p. 457, notes.
§ 1 Peter's Cir. Rep. 182. ‖ 3 Greenleaf's R. 1.

between the master and crew, then immediately ceases.

If a seaman die during the voyage, his representatives may recover the amount of his wages up to the time of his death. So, if a seaman leave the ship without any fault of his own, he may recover his wages.*

Where the crew of a ship-wrecked vessel rescue a portion of the wrecked property from danger, they have a valid lien upon the goods saved for an equitable compensation in the nature of salvage, yet they have no right of action on their contract for wages.†

OF THE DUTY OF THE MARINERS IN CASE OF DISASTER.

It is a well established rule of maritime law, that freight is the mother of wages; and therefore if the ship be wrecked on her passage, and earn no freight, the seamen lose their wages. Hence it has sometimes been urged, that immediately on the wreck of the vessel, the contract of the seamen is dissolved, and they are no further bound to labor for the preservation of her, or the property on board. But, "it is more consonant to reason, to justice, and to the nature of the contract, to hold, that, in all cases of disaster, the seamen are bound to remain by, and preserve the ship and cargo as far as

* 2 Mass. R. 39.

† 2 Mason, 319.

they can ; and to punish their neglect by a forfeiture of any wages which have been previously earned in the voyage."*

In case, therefore, of the stranding or wreck of the vessel, the master has a right to command the services of the mariners to assist in saving the wrecked property. Until the master has abandoned the hope of saving the vessel and of earning freight ; and while he commands their services for the purpose of *rescuing her from her peril, and putting her in a position to resume her voyage*, the mariners are attached to the vessel under their contract, and *bound* to obey the master, as such. For this service, (unless their efforts are successful, and a *pro. rata*, or full freight is subsequently earned,) no wages is due them either as *salvors* or as *laborers by the day.*

But when the disaster is such that the master abandons all hope of rescuing the ship, and of earning freight, then their claim for wages is gone ; but if, by their exertions, any portion of the property is saved, the seamen are entitled to their wages out of the same, as far as it goes, in the nature of a *salvage*, for rescuing the property.

The popular idea among seamen that the moment a vessel is stranded, they are released from the obligation to serve as mariners, and that for any thing done towards getting the ship afloat, they are entitled to *per diem* pay like strangers who may

* 2 Mason, 337.

come to their aid, seems hardly reasonable, since the effort is an experiment, which, if successful, is to benefit them in degree with the owners.

The claim of the seaman is not under his contract for wages out of the freight; but in a new character, as a *salvor*, he regains a rightful claim to wages restored by his exertions in rescuing the articles saved, whether parts of the ship or cargo, from the perils or loss to which the wreck had exposed them.*

The amount of salvage, in such cases, usually decreed to the seamen who have acted as salvors of the property, is the amount of their wages up to the time of their discharge. Where their conduct has been very meritorious, or where they have exposed themselves to extraordinary peril in their efforts to save either life or property, a greater amount is sometimes decreed, but seldom or never a less sum, where the amount of the property saved, is sufficient to cover such wages.†

If the property saved has been underwritten upon, and is abandoned to the underwriters, they must pay this salvage if the property comes to their hands. But the seamen have a valid lien upon the property saved for this salvage, if they choose to rely upon it.‡

In case of the stranding or wreck of the vessel, and the master employs the seamen, or any of them, to assist in watching and protecting the ves-

* 1 Peters, 48. † 2 Mason, 338. ‡ 3 Mass. R. 563.

sel, or goods, he may, if he afterwards sells such vessel or goods, under his authority as master, pay such seamen a reasonable compensation out of the fund so obtained.

Under the form of policy made use of by the Boston offices, it is provided, that, "in case of a total loss of a vessel with salvage, the amount allowed out of the salvage to the officers and crew, for wages earned, or services rendered previously to the loss, shall be considered as so much of the salvage applied to the use of the ship owners, even although the same should be allowed or paid under the name of salvage, and not as wages, and shall accordingly be deducted in adjusting the loss."

OF STATE LAWS RELATING TO SEAMEN.

In Delaware, when engaged on board of a vessel, no mariner can be arrested for a debt contracted above ten shillings in amount.

In Virginia, foreign seamen, parties to the shipping list, who absent themselves without leave from the vessel (whether American or foreign) may be carried before a justice of the peace, by a warrant, and committed to jail until the vessel is ready to sail, and then delivered to the master.

Apprentices, regularly bound to the master or owner for a term of years, may be dealt with in the same manner. If, however, the seaman or apprentice prove, before the justice, that he has been cru-

elly or improperly treated by the master, or that he has good reason to apprehend personal danger from the master, should he be compelled to remain on board, the justice may discharge him from confinement.

If masters discharge or land any sick or disabled seaman without providing for his maintenance and cure, they forfeit $60; and if they land any passenger without the means of procuring his maintenance for one month, they forfeit $50.

Tavern keepers selling drink on credit to a sailor in actual employ of a vessel, lose the debt, and forfeit $2 to the master of the vessel. The same penalty is incurred by harboring or entertaining a sailor in actual pay, without the consent of the master.

In Georgia, persons giving credit to seamen for more than five shillings, lose the debt; and if a person, without leave of the master, harbors a sailor who has signed the shipping articles, he forfeits 40 shillings for every twenty-four hours he harbors him.

Persons selling a seaman spiritous liquor to the amount of more than one shilling and six pence per day, or suffering a sailor to drink in their houses after nine in the evening, forfeit $5.

In Alabama, persons secreting deserters from any merchant vessel are liable to a penalty of $10 for every day they continue so to harbor such seamen. Masters employing seamen belonging to, or pre-

tending to be discharged from another vessel in that state, must obtain a certificate of their discharge, under penalty of $50. A seaman absenting himself from his vessel without leave, is liable to be committed to the house of correction until the vessel sails.

In Louisiana, captains of vessels arriving at New Orleans, are required to give to all sailors discharged from their vessels, a certificate of discharge. If a sailor desert, the master must, within twelve hours after, affix a notice of the desertion in the mayor's office, with the name of the vessel and deserter, and a description of the latter, signed by the master. Masters employing seamen without a certificate of discharge, are liable to a fine of $50; and if a sailor applies to enter without such certificate the master must notify the other masters in port who have given such notice. If the master refuse to give such discharge, the sailor, if entitled to it, can compel him to do so before the parish court.

Any keeper of a public, or boarding, house, harboring or secreting a deserter from a merchant vessel, is liable to a fine of $100, and to imprisonment of thirty days, at the discretion of the court.

OF EMBEZZLEMENT BY THE SHIP'S CREW.

WHERE an embezzlement has arisen from the fault, fraud, connivance, or negligence of the crew, they are bound to contribute to it in proportion to

their wages; where the embezzlement is fixed on an individual, he is solely responsible.*

Where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all are liable; but where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master.†

If any seaman who is engaged in a salvage enterprise, embezzle a part of the property, he forfeits the right of salvage.‡

* 1 Mason's R. 104. † Ibid. ‡ Gallison's R. 593.

CHAPTER XIV.

OF CRIMES COMMITTED ON THE HIGH SEAS.

To assist, or be concerned in the robbery or plunder of any vessel in distress, wrecked or stranded; or to obstruct or attempt to obstruct the escape of any person from such vessel; or to hold out any *false* lights, or to *extinguish* any *true* lights, with intention to bring any boat or vessel into danger or distress, subjects the offender to a fine of $5,000 and imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.*

If the master of any vessel, while abroad, *maliciously* and without justifiable cause, forces any officer or mariner belonging to his vessel, on shore; or leaves him behind in a foreign port, refusing to bring him home again when such officer or seaman is willing and ready to return, every master so offending is liable to a fine not exceeding $500, or to be punished by imprisonment not exceeding six months, according to the aggravation of the offence.†

It is felony and punishable with *death* for any person to *wilfully and maliciously* set on fire, burn

* Act 3d March, 1825, sec. 9. † Ibid, sec. 10.

or otherwise destroy any vessel of war of the United States, or to assist or aid in the same.*

The same penalty is incurred for any of the officers or mariners of any merchant vessel, to wilfully and corruptly cast away, burn or otherwise destroy the vessel to which they belong, or if they procure the same to be done, they suffer a like penalty.†

If the owner of any vessel wilfully and corruptly cast away, burn or otherwise destroy any vessel of which he is owner in part or in whole, or direct or procure the same to be done with the intent or design to prejudice any person or persons who may have underwritten upon the same, he is deemed guilty of felony, and must suffer death.‡

To conspire with other persons for the above purposes or to be concerned in the building, fitting out or other equipment of any vessel to be sent out for such a purpose, subjects the offender to a fine of not exceeding ten thousand dollars, and to imprisonment and confinement to hard labor, not exceeding ten years.§

If the crew of any vessel, or any one or more of the same, by threats and violence, or by fraud and conspiracy, usurp the command of the ship, or prevent the lawful commander from exercising his just authority, or commit the command to another person not lawfully authorized to exercise the same, the person or persons so offending, and their aiders

* Act 3d March, 1825, sec. 11. † Act 26th March, 1804, sec. 1.
‡ Act 26th March, 1804, sec. 2. § Act 3d March, 1825, sec. 23.

and abettors, are guilty of a mutiny and revolt, and are punishable with a fine not exceeding two thousand dollars and by imprisonment and confinement to hard labor not exceeding ten years.*

For any one or more of the crew of any vessel to endeavor to make any revolt or riot on board, or to stir any others of the crew up to mutiny or insubordination, subjects the offender to a fine not exceeding one thousand dollars, or to punishment to hard labor in prison not exceeding five years, or to both, according to the aggravation of the offence.†

If the master, or other officer, of any vessel on the high seas, beat, wound, or imprison any one, or more, of the crew of such vessel, without justifiable cause, or withhold from them suitable food and nourishment, or inflict upon them any cruel, or unusual punishment, through malice, hatred, or revenge, every person so offending, is liable to be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the aggravation of the offence.‡

If any person, or persons, upon the high seas, or where the tide ebbs and flows, on board of any vessel, commit an assault upon another, with a dangerous weapon, with intent to kill, rob, steal, or to commit a mayhem or rape, such person is liable to be punished by fine not exceeding three thousand

* Act 3d March, 1825, sec. 1. † Ibid. sec. 2. ‡ Ibid. sec. 3.

dollars, or by imprisonment not exceeding three years.*

If any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, takes and carries away, with an intent to steal or purloin, the personal goods of another, the person so embezzling such property, is liable to be fined not more than four-fold the value thereof, one-half to be paid to the owner of the goods, and the other half to the informer and prosecutor. Persons buying or secreting such goods, knowing them to be stolen, or harboring or secreting such offenders, knowing them to have offended, subject themselves to a like forfeiture. They are also in both cases liable to be publicly whipped,† not exceeding thirty-nine stripes.

Any confinement of the master, whether by depriving him of the use of his limbs, or shutting him up in the cabin, or by intimidation, preventing him from a free use of every part of the vessel, is a confinement in contempt of the law.‡

If any person wilfully and maliciously cut, spoil, or destroy any cordage, cable, buoys, buoy-rope, head-fast, or other fast fixed to any anchor or moorings, belonging to any vessel, boat or raft, every person so offending is deemed guilty of felony, and

* Act 3d March, 1825, sec. 22.

† This latter remnant of barbarism should be forthwith repealed; as doubtless it would be, if only once brought to the notice of those to whom that duty belongs.

‡ 1 Peters, 118. 213.

is liable to be punished by a fine not exceeding one thousand dollars, and by imprisonment and confinement to hard labor not exceeding five years.*

OF PIRACY.

Piracy is punished by death. It is declared to be piracy for the master and crew of one vessel upon the high seas, to feloniously and violently, seize upon and rob the master and crew of another vessel; or to despoil them of the goods and effects intrusted to their charge.

So also it is piracy for the master or mariners of any vessel, to piratically, and feloniously, run away with any vessel committed to their charge, or any goods to the amount of fifty dollars; or to yield up such vessel, voluntarily, to a pirate. And so likewise is it piracy for any seaman to lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of the ship or goods committed to his trust.†

The crime of piracy may be committed in any open roadstead, river, creek, haven, basin or bay, where the sea ebbs and flows, as well as upon the high seas; and is punished in the same manner.

So also, if any person or persons, engaged in any piratical cruise, land from their vessel or vessels, on shore, and commit a robbery, it is deemed and punished as piracy.

* Act 3d March, 1825, sec. 7. † Act 30th April, 1790, sec. 8.

By the act of the 15th of May, 1820, it is declared to be piracy for any one to be engaged in kidnapping, on any foreign shore, any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States; or for any one to decoy, or forcibly bring, or carry, or receive, such negro or mulatto, on board of any vessel, with intent to make the same a slave; and this act extends to all persons voluntarily employed on board of vessels transporting the same, and also to all citizens of the United States, whether employed on board of foreign or domestic vessels, as well as to all foreigners employed on board of vessels belonging to citizens of the United States.

The captors of any piratical vessel, upon her being brought into port, and legally condemned, become entitled to the proceeds of the sale, made under order of the court having jurisdiction.

CHAPTER XV.

MARINE INSURANCE.

Of an agreement for insurance—The policy and its usual stipulations—Implied conditions of the policy—Description of the assured—Of valued policies—Of open policies—Of representation and concealment—Of facts that must be disclosed—Of express warranties and conditions—Of the time when the risk commences and when it ends—Of the various perils and risks against which the underwriter insures—Description of the subject insured—Insurable interest of the mortgagor, mortgagee, charterer, factor, supercargo, lender on bottomry, borrower on bottomry; on profits, freight, &c.—What risks may be insured against—What is a loss within the policy—Of partial loss and adjustment—Of maritime loans, bottomry and respondentia—Of deviation—Of abandonment of the ship—Of abandonment of the cargo—Of general and particular average—Of salvage—Of barratry.

Insurance is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks. The party undertaking to make the indemnity is called the *insurer* or *underwriter;* the party to be indemnified the *assured* or *insured.* The agreed consideration is called a *premium;* the instrument by which the contract is made, a *policy;* the events and causes of loss insured against, *risks* or *perils;* and the property or rights of the assured, in respect to which he is liable to loss, *the subject* or *insurable interest.*

AN AGREEMENT FOR INSURANCE.

When the terms of an insurance upon any property has been agreed upon, and nothing remains

but to make out the policy, the parties consider the risk to be assumed and the premium due from that time. But it does not appear that the parties are *legally* bound until the policy is filled up, or some memorandum of the contract signed, and either actually or constructively delivered to the assured. Insurance *companies* usually keep a book in which all applications for insurance are recorded; and when the bargain is made, and nothing remains but to make out the policy and receive the premium note, the word "done," is written upon the margin, together with the rate of premium. This is usually deemed a completion of the contract, so that if a loss should happen before the policy should be actually filled up and delivered, the insurers would be bound. The insured, however, ought not to rest upon this evidence of the contract, but should lose no time in giving the premium note and taking the policy away, and by this means prevent all misconception of the nature of the contract.

THE POLICY, AND ITS USUAL STIPULATIONS.

A MARINE policy contains, in general, that the underwriters cause the insured to be insured in a certain sum, on ship, cargo, freight or profits, for a certain voyage, or time, against certain enumerated risks; for which they confess themselves to have been paid a premium at a certain rate per cent.

These are the leading and substantial parts of every policy, and in connection with these are introduced all the *provisions*, *stipulations*, *conditions*, and *warranties*.

The express warranties usually contained in the policy, are, that the ship sailed, or will sail, on, or before a certain day; that she carries a certain number of guns, is manned by such a crew, carries a license; or that the vessel, or cargo is owned by Americans or people of some particular country; or is neutral. But it is not uncommon to warrant expressly against the risk of illicit trade, and of liability for partial loss on the vessel or goods,—and to insert many other conditions which tend to qualify the force of the contract, as usually construed; it being a general rule that the written part of the policy shall control the printed part.

In respect to the risks, it is often provided that the assured shall have liberty to touch at certain ports out of the usual course of the voyage, or to take letters of marque and cruise, or to carry the goods on deck, or to carry simulated papers.

It is customary, also, for the parties to agree that, in case of any prior insurance on the same subject, the policy shall be valid only to the amount of the deficiency of such prior insurance to cover the full value of the property, and that the insurer will return the premium on the excess over such value; and that the rights and obligations of the parties shall not be affected by any subsequent insurance.

Though the insurer generally acknowledges in the policy that he has been paid the premium, yet the payment is in fact generally made in the promissory note of the assured. If a loss occurs, it is stipulated that the amount of the premium note, if unpaid, and any other sums due or coming due from the insured, may be deducted from the sum payable to the assured under the policy.

It is usually stipulated, in the form of policies used in the United States, that there shall be no demand upon the underwriters, to make good any loss upon the ship, and most other subjects of insurance, unless it exceed five per cent., except in a case of general average.

Certain kinds of merchandize go under the name of *memorandum articles*, from the circumstance of their having been introduced under a memorandum, or N. B. By the form of policy in most frequent use in the United States, the insurers say they will not "be liable for any partial loss on *hemp* and *flax*, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on *sugar*, *flax seed*, *bread*, *tobacco* and *rice*, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on *salt*, *grain*, *fish*, *fruit*, *hides*, *skins*, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding."

In some policies it is agreed, that, in case of a return of premium, the insurer shall retain one-half per cent. upon the sum insured. This is considered to be a compensation to him for the trouble of making a contract, which he, on his part, is ready to fulfil, but of which the assured neglects to avail himself. But most of the insurance companies in Boston have omitted this provision in their policies of late years, and return the whole premium in case of short property.

OF THE IMPLIED CONDITIONS OF THE POLICY.

It is an implied condition of every policy, and of the same force as if it were expressly inserted in the instrument, that the assured, at the time of making the contract, shall fairly disclose to the underwriters every fact material to the risk, which is exclusively within his knowledge, and which is not embraced by some agreement in the policy; and if this condition is not complied with, the policy is void.

It is always an implied condition that the voyage shall be pursued by the usual route, and in the usual manner. And that the ship shall be provided with all the necessary papers required by the laws of the country to which she belongs, the law of nations and treaties.

The assured is understood, by the act of procuring the policy, to warrant that the vessel is sea-

worthy, and in every respect fit for the voyage or service on which she is employed. This agreement is uniformly a part of the contract, though it is never expressed in the policy.

WHO MAY INSURE, AND PROCURE INSURANCE.

In this country, any person of legal age, except an alien enemy, may become an underwriter on property at risk; and, with the same limitation as to alien enemies, every person in these United States has a legal right to procure insurance. Most of the underwriting in this country is carried on, however, by incorporated companies.

DESCRIPTION OF THE ASSURED.

In many policies the assured is so described that any person may be comprehended, and avail himself of the contract by proving his interest, and showing that the contract was intended for him. The manner of expression, where the intention is to use a sweeping clause which shall at all events take in the person interested, is, after naming the broker, or other person who procures the insurance, to add that he is insured for "himself and whom it may concern."

A policy in the name of any particular person, with the clause "*for whom it may concern*," or other equivalent words, will be enforced to protect

the interest of any person in whose behalf it was intended, and by whose authority it was effected. But it must be made to appear, not only that the person claiming had an interest in the property insured, but that he *authorized* the insurance to be effected, or *adopted it* when made.*

If a policy does not contain this general clause, no others than those *named* as the assured, or on whose *account* it is expressed to be made, can avail themselves of it.†

Where A. procured insurance, *in his own name*, upon property belonging to himself and B., in the sum of "$10,000, on property on board of the ship Northern Liberties, as property might appear," meaning by those words to cover both his own and B.'s property on board, the court held that the insurance covered only the portion of the property belonging to A.‡

Where insurance is procured by an agent for his principal, he may describe himself as agent, generally, without naming his principal or principals, and he will be permitted to prove for whose benefit the insurance was really effected.§

In case insurance is effected by an agent, and a loss happens, the premium note, if unpaid, may be deducted from the loss, and all other notes given by the agent for the same *principal;* but the notes given by the same agent for other parties cannot be offset against the loss.‖

* Condy's Marshall, 473, note. † 11 Pick. 85. 4 Mass. 647.
‡ 2 Cranch, 419. § 12 Mass. R. 80. ‖ 1 Sumner, 471.

OF VALUED POLICIES.

INSURANCE being a contract of indemnity, the underwriters are not liable to pay any loss except such as the assured has actually sustained. If the property insured be worth but $800, and an insurance of $1,000 be effected upon it, still, if its loss ensue, the insurer can be called upon only to pay the amount of the loss sustained by the owner, viz. $800. If, on the other hand, the property be worth $1,000, and be insured for $800 only, then, in case of its loss, the underwriter is only liable to the amount of $800, and the remaining risk of $200 is taken by the owner himself; he is his own insurer to that amount. If the value of the subject is exactly equal to the sum insured, the whole amount insured is to be paid.

It becomes, then, essential to know the value of the articles insured, before any loss sustained upon them can be adjusted.

Policies are of two kinds — *valued* and *open*. Those in which the value of the subject is agreed upon, are called *valued policies*. If the valuation thus agreed upon be neither intended as a cover for a wager, by *both* parties, nor fraudulently made by the *assured*, it is binding on the parties, and determines the value of the property. If the parties, without intending to wager, fairly agree to estimate the property at a high rate, their agreement will be

valid. Unless the valuation is grossly enormous, so as to be indicative of fraud, it will not be inquired into. Some value, however, must be proved, or the policy never attaches.*

Vessels are generally insured by *valued* policies. This prevents the trouble and perplexity attendant upon proving the value of the ship after the loss has occurred, which always must be a matter of much contrariety of opinion. If left to be proved after a loss has occurred, it must, to say the least, be hard to arrive at a satisfactory conclusion. Where the owner of the ship is the proprietor of the goods on board, an insurance upon her freight is generally made by a *valued* policy. In other cases the amount of the freight is easily proved, and therefore the necessity of insuring it by a valued policy does not exist. But it is, nevertheless, not unusual to value the freight in the latter case.

Goods are more frequently insured by open policies, since the value is easily proved by the invoices, or by showing the price current at the time. But if the goods are of a kind the price current of which cannot be easily shown; or if the price has greatly changed, subsequently to the purchase of the goods; or if their value has been increased by transportation, the insurance is often made upon them by a valued policy. Hence goods obtained by barter at such places as the northwest coast of America, South Sea islands, or coast of Africa,

* 3 Bin. 205. 2 Burr, 1198. 5 Cranch, 110.

where there may be no standard value in money, or where the currency of the place of shipment is of an uncertain and fluctuating value, as in Hayti and many parts of South America at the present time; or, where again the profits of the expedition depend, in a great measure, upon the market value of the return cargo in the home port, which may very much exceed the prime cost; in these, and similar cases, it is usual to affix a value to the property in the policy, either by a valuation in *gross*, or by valuing the currency in which the invoices are made out at a certain price in federal money; as for instance, 20 cents per franc; $5 per pound sterling; 42 cents per guilder; 75 cents per rix dollar, &c. By this means the assured is enabled to obtain a full indemnity, and much perplexity is avoided in adjusting the loss.

In adjusting a loss under an open policy on freight, it is usual to take the current rate at the time the vessel took in her cargo. But the rule often works much injustice, as the rate may be inflated or depressed by circumstances; and it is therefore advisable, in most cases, that the freight, should be insured under a valued policy.

A valuation in a policy only affects the parties to it, and the same property may be valued differently in different policies, and each valuation will be valid as respects the parties to the contract of which it is a part.

A ship being valued in one policy at $6,000, and

another at $8,000, and $6,000 being paid on the latter policy, the underwriter on the former contended that, as the assured had been paid the sum at which the ship was valued in the policy subscribed by them, he could claim nothing of them. Lord Ellenborough said, "The valuation is only conclusive between the assured and the underwriters, without taking into consideration what had been transacted between the assured and third persons.

Where the assured expects goods to be shipped, but does not know the kind or the amount, the policy is sometimes made on goods "to be thereafter declared and valued." Under a policy in this form, the declaration of the value, to make it a valued policy, must be made by the assured before he has intelligence of a loss.*

In *general average* the valuation in the policy is not regarded, since the adjustment in that case is made at the port of destination, and upon the value of the goods or property at that port. Whether the property is insured or not, valued in the policy or not, is not a matter of inquiry in adjusting general average. When the adjustment has been made, and the ship, freight or goods, have contributed, the owner may, then, if there was insurance upon either, call upon the underwriters for the amount thus contributed.

But in case of *partial loss* of a ship or goods, the

* 8 Term R. 15, note.

valuation in the policy must prevail in adjusting the loss. The policy is not, as it has been contended that it should be, *opened* for adjustment. The principle on which the adjustment is made may be illustrated in this manner. Suppose A. ships 1000 barrels of flour which cost him $6,000. He procures insurance upon 500 barrels of the same in an open policy, and on the remaining 500 barrels he gets insurance, *valuing* them in the policy at $4,000. A partial loss ensues. At the port of destination it is found that the 1000 barrels of flour, sound, would have been worth 12,000; but in their damaged state are worth only $10,000. A loss, then, of $2,000 upon the flour has accrued, or 16⅔ per cent. Consequently under the open policy, in which the cost is proved to have been $3,000, A. recovers 16⅔ per cent., or $500; and on the 500 barrels, which he valued at $4,000, he recovers also 16⅔ per cent., which is $666 67. The perfect justice of the rule is apparent when we consider that if A. paid a premium of one per cent., it would be $30 on the open, and $40 on the valued policy, which two sums bear an exact proportion to the amount recovered under the policies. The latter being just one third more than the former.

The merchant should, however, be careful when procuring insurance, on his *ship*, *cargo*, *freight*, and *profits*, or upon any *two* of them, to value each separately in the policy. Otherwise the policy

must be opened for the adjustment of a partial loss on either of them.

The insurer, whether under a *valued*, or an *open policy*, is only liable for partial losses in the proportion which the amount he insured bears to the whole value of the subject insured. Hence, if certain goods be valued at $5,000, and A. insures upon them the sum of $2,500, and afterward a partial loss upon them takes place, by which they are damaged to the amount of $2,500, A. will in that case be liable for 50 per cent., or $1,250 of such partial loss only, since he only insured to the amount of 50 per cent. on the value of the property.

OF OPEN POLICIES.

If the value of the subject insured, is not agreed upon in the policy, it must be proved by the assured before he can recover a loss, and certain rules are adopted in ascertaining its amount.

In the case of both ship and cargo, the value of the property, at the commencement of the risk, is the value which governs in the adjustment of the loss. If it be a ship that is insured, and her value at the commencement of the risk is $9,000, it matters not that subsequently, either by wear or tear, or by a reduction in the price of ships, she has become worth no more than $6,000, her value when the risk was taken must prevail; and in case of a to-

tal loss, the $9,000 would be recoverable of the insurers.*

Insurance intends no more than an indemnity to the merchant for the property he has at risk. It is not intended by the contract of insurance to put the assured in the same situation, in case of a loss, that he would have been in, had the adventure terminated successfully. It only pretends to place the assured, in case of loss, in the same situation he was in when the adventure commenced.

The ship, as a subject of insurance, includes the tackle, boat, provisions, and whatever is necessary to equip her for the voyage. To this is to be added the premium, and the whole goes to make up the value of the ship. If the ship has been recently purchased, then her cost and the premium is her valuation in the policy.†

The insurable interest in goods, is their invoice value at the port of lading, together with the premium and shipping charges. The most satisfactory evidence of their value is, generally, the price paid for them, in case they are purchased near the time when the risk commences upon them. Hence, if an open policy is made upon successive passages from port to port, and upon shipments successively made at different ports, though the subsequent shipments are only the proceeds of the first, yet the in-

* 7 Mass. R. 365. 9 do. 436. 7 Johns. 343.
† 1 Johns. 80. 2 Valin, 55.

surable interest may be greater, for the *invoice value of each shipment* is the measure of the interest.*

Besides the price paid for goods, the charges upon them are included in the amount of interest. These include labor, storage, expense of transportation, and commissions actually paid to agents and factors. To these are to be added the premium.†

If the goods have been transported, either by land or sea, subsequently to the purchase of them by the assured, and previous to the commencement of the risk, the expense of such transportation is a part of the interest to be covered. But the *freight*, or other expense to be incurred on the goods *during the risk*, are not a part of the insurable interest.‡

Freight advanced by the owner of the goods, and not to be recovered back in *any event*, constitutes a part of the insurable interest. It is a portion of the price or cost of the goods.§

Where the insurers reserve one or two per cent. out of all losses, it is necessary to add the same proportion,—that is, as 1 is to 99, or 2 to 98,—to the amount of the interest, if a full indemnity is intended, so that in a total loss the assured may receive back the capital put at risk.

The insurable interest in freight is the gross amount to be received according to the bills of lading or charter party.‖

* Phillps on Ins. p. 322. † 9 Johns. 29. ‡ Phillips, p. 322.
§ Ibid. p. 323. ‖ Stevens on Average, p. 176.

Profits. There should never be an open policy on profits, since, in case of loss, the actual loss of profits sustained must be a matter of much contrariety of opinion, if not of litigation. In New York the courts have adopted the rule, that in a policy on profits, the sum insured is the *valuation*, and that the act of making the policy is an agreement to that effect. In this case the only question will be, whether the whole of the goods were at risk, of which the profits were insured.

The lender on bottomry, or respondentia, has an interest to the amount of the loan, and the borrower may insure the excess of the value of the property over that amount.†

OF REPRESENTATION AND CONCEALMENT.

ANY contract obtained by the fraud of a party, is void in respect to the other parties. This is especially the case in regard to insurance, in which *fair dealing* and *good faith* are *strictly required* by the law, and much relied upon by the parties. The contract is generally entered into by the insurer in consequence of the *representations* of the assured, and if these representations do not enable the insurer to make a just estimate of the risk, it is plain that he ought not to be bound by the contract.

A *representation* is a *material* fact stated before completing the contract, by either party to the oth-

† 2 Caines cases, 110.

er; and a *misrepresentation* is the statement of such a fact which turns out not to be true. A *concealment*, on the other hand, is the suppression of a *material* fact within the knowledge of either party, which the other has not the means of knowing, or is not presumed to know.

If either party, whether by *design*, or through *negligence*, *mistake*, or *oversight*, *conceals* or *misrepresents* a fact material to the risk, the contract is void with respect to the other party. But the *misrepresentation* or *concealment* must be of a fact *material* to the *very risk or risks insured against*, to work an avoidance of the policy.*

A *representation* made to an underwriter, must be true or he is discharged; and if the assured represents facts without knowing the truth, he takes the risk upon himself.

If the assured, or his broker, omits to state a material circumstance, supposing it not to be material, this discharges the underwriter.†

f an underwriter insures a vessel that he knows to have arrived, the policy is void.‡

The representations ought to be reduced to writing, and signed by the parties. If an insurance broker makes representations that he ought not to have made, he is liable for the damages that may ensue therefrom to his principal.

If the assured states a mere *expectation* or *opin-*

* 1 Term R. p. 12. † Doug. R. 306, note. ‡ 3 Burr, 1905.

ion, or expresses himself in a qualified or doubtful manner, yet at the same time fairly, but without any absolute assertion of a fact, it is not a representation, and does not avoid the policy.* Where the assured represented that he expected to load his vessel with hay, and after procuring insurance upon her, took in paving stones, and she was subsequently lost, it was held not to be a misrepresentation, but merely a statement of an *expectation*, and did not avoid the policy.

OF FACTS THAT MUST BE DISCLOSED.

The assured is not required to represent facts of general notoriety, or which are presumed to be known to those conversant with the trade; but he is required to state *fairly* and *fully* other facts within his knowledge that are *material* to the risk. If a knowledge of the circumstances suppressed, would have induced the insurer to demand a *higher* premium, or to *refuse* to underwrite, it will invalidate the policy.†

The usages of trade need not be stated, since those, the underwriter is presumed to know. The insured need not state that the ship is seaworthy, or any facts which go to prove her so, because every contract of insurance is upon the implied warranty of the seaworthiness of the ship.

* Cowper, 785. † 3 Dal. 491. 12 Johns. 517.

If the merchant has heard that his ship has been captured, or sunk, or that a ship resembling her has met with such a disaster, though both are but mere rumors, yet he must disclose them to the insurer if he would afterwards procure insurance, otherwise the policy will be void.*

If after giving instructions for effecting a policy, the person who has given the instructions receives intelligence *material* to the risk, he must immediately disclose it, or countermand his instructions.†

If the vessel is known to be out of time, the circumstance must be stated to the underwriters.‡

If the time of sailing be incorrectly stated, so as to make the insurer believe that the vessel is not out of time, when, in fact, she is out of time, the policy will not bind the underwriters.§

Material facts must be *fully* and *fairly* stated. Where the assured knew that there had been a violent storm at Norfolk, about eleven hours after the vessel sailed from that port, and he represented to the underwriters that there had been "blowing weather and severe storms on the coast after the vessel had sailed," without mentioning the particular storm, a majority of the judges of the supreme court in New York held it to be a *concealment.*‖

It is sufficient to represent facts, and the assured

* 2 P. W. 170. † Ibid. ‡ 1 Esp. 373.
§ Park, 285. ‖ 2 Caines, 57.

may be silent as to any *speculations* or *apprehensions* that may be grounded upon them. The underwriters may be left to draw their own inferences from the facts disclosed.

OF EXPRESS WARRANTIES AND CONDITIONS.

An *express warranty* is an agreement *expressed in the policy*, whereby the assured stipulates that certain facts relating to the risk are, or shall be, true; or certain acts relating to the same subject, have been, or shall be, done. The effect of an express warranty *in the policy* is to make it *vital* to the validity of the same, that the warranty should be complied with. It is no matter that the act or circumstance warranted, is not *material* to the risk. It is a part of the contract that the matter is as it is represented, and the materiality, or immateriality, signifies nothing. The only question is as to the mere fact.

An express warranty or condition is always a part of the policy, but like any other part of the express contract, may be written in the margin, or contained in proposals or documents expressly referred to in the policy, and so made a part of it.*

A warranty is often made by saying, expressly, in the policy, that the assured *warrants* such a fact. But a formal expression of this sort is not requisite to constitute a warranty. Any direct, or even inci-

* Phillips, p. 125.

dental allegation of a fact relating to the risk, has been held to constitute a warranty. If insurance be made on the "Swedish brig Sophia," the "American ship Minerva," or "on goods on board of vessels so described," it is a warranty that the vessel is Swedish, or American, according to such description.

A *warranty* differs from a *representation* in another respect, since the former must be *strictly* and *literally* complied with; whereas it is sufficient that the latter is complied with *equitably* and *substantially*. It is held that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into; the insured has chosen to rest his claims against the insurers on a condition inserted in the contract, and whether the fact or engagement which is the subject of the warranty, be material to the risk or not, still he must bring himself strictly within that condition.

A non-compliance with a warranty, though it occasions no damage, and does not change or increase the risk, has the effect of discharging the insurers from their liability.*

It has even been held that a temporary non-compliance with a warranty, by a defect which is remedied before any loss happens, still discharges the underwriters.†

* 2 Esp. 615. 7 Term R. 705. † Term R. 343.

A compliance with a warranty or any other agreement is dispensed with, if it be rendered unlawful by a law enacted after the time of making the policy. But if a compliance be unlawful at the time of making the contract, the policy will be void.*

OF THE TIME WHEN THE RISK COMMENCES, AND WHEN IT ENDS.

Policies usually expressly declare that "the adventure shall begin upon the said goods and merchandize *from the loading thereof on board the said ship*, and so shall continue until the said ship, goods, and merchandize shall have arrived at L; and upon the said ship until she has been moored at anchor twenty-four hours in good safety; and *upon the goods, till the same be there safely discharged and landed.*" From these words it is obvious that the insurers are not answerable for any accident which may happen to the goods, in lighters or boats going on board previous to the voyage; yet, as the policy says the risk shall continue till the goods are safely landed, it seems the insurer continues responsible for the risk to be run in carrying the goods in boats to the shore. If there be a loss, however, in these cases, the accident must have happened while the goods were in the boats or lighters *belonging* to the ship; and where the

* 1 Salk, 198. Lord Raymond, 371, S. C.

owner of the goods brings down his own lighter, receives the goods out of the ship, and before they reach land, an accident happens, whereby the goods are damaged, the insurer is discharged, although the insurance be upon goods "to New York, and *till the same be safely landed there.*"

It has, however, been decided, that an arrival in port, where the vessel is at once ordered back to perform quarantine, is not an arrival which will discharge the insurers, from a loss at quarantine, as the arrival and mooring "in good safety," must be construed to mean an opportunity of loading and unloading.

In an insurance upon freight, the risk begins from the time the goods are sent on board; but if a ship, sailing under a contract, be lost on her way to the port of lading, or at the port of lading, before taking in her cargo, the insurer is liable—the right to freight having commenced.

But if the policy be a *valued* policy, and part of the cargo be on board when such accident happens, the rest being ready to be shipped, the insured may recover the whole amount of the freight.*

If the cargo be temporarily landed, from necessity, during the voyage, it is still protected by the policy.

Where a vessel is bound to a West India Island, as Jamaica, and insured from the port of departure

* Blunt's Com. Dig. p. 203.

to Jamaica generally, it is laid down that the outward risk upon the *ship* ended twenty-four hours after her arrival in the *first port* in the island to which she was destined; but that the outward policy *upon goods* continued till they were landed.*

In insurances upon East India voyages, the insurers in England have been held liable, not only for the events which may possibly happen from the port of discharge to that of delivery, but also *for all intermediate or country voyages.* And this construction of East India policies prevails, whether the words of them be large and comprehensive, such as, "with liberty to touch, stay and trade at any port or place whatsoever;" or restrained and limited, such as, "to touch and stay at any port or place in this voyage." If it appears, however, from the terms of the policy, that such a construction was not intended by the parties, then effect will be given to the policy according to such supposed intention.

In the unloading of goods there should be no *unnecessary* delay; but what is unnecessary delay must always depend upon circumstances.

The risk on the body of a ship is generally to commence "from her beginning to load at and so shall continue and endure until the said ship shall arrive at and hath there been moored, at anchor, twenty-four hours in good safety." This mode of stating the commencement of the risk must

* 2 Esp. 412.

commonly be applied to insurances on ships outward bound; for, when insurance is made on the homeward risk, the beginning of the adventure is sometimes stated to be "immediately from and after her arrival at the port abroad," and at other times, "from the departure;" and in short, it is very variable, depending upon the inclination of the parties.

OF THE VARIOUS PERILS AND RISKS AGAINST WHICH THE UNDERWRITER INSURES.

The words now used expressive of the insurer's risk, are very extensive, including "perils of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever; barratry of the master or mariners; and all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, damage of the said goods and merchandize, and ship, or any part thereof."

The policy is so general in its terms, as to embrace every species of risk to which ships and goods are exposed from the perils of the sea, and all other causes incident to maratime adventures. The perils, however, may be enlarged or abridged, at the pleasure of the parties.

Where there is no representation of neutrality, the insurer takes upon himself war risks.*

* 1 Caines, 217.

It is frequently the practice to insure a vessel, "lost or not lost;" in which case, if the ship should be lost at the time of the insurance, still the underwriter, provided there be no fraud, is liable.

DESCRIPTION OF THE SUBJECT INSURED.

It is important to the validity of the contract, that the subject to be insured, should be so far described in the policy, as to enable it to be identified. As the contract will embrace no other subject than that described, its validity will depend upon the sufficiency of the description. A policy on *hats* will not cover piece goods, nor will one on *oil and barilla*, apply to *soap*. If, however, the description designates the subject with sufficient certainty, or suggests the means of doing it, a mistake of the name of the ship, or of other particulars, will not defeat the contract.*

If one owns a half or any other proportion of a ship or quantity of goods, he may effect insurance generally without specifying his interest, and he will recover for such interest as he has. And a mortgagee may insure in the same way, and so may a charterer of a ship.†

A lender on bottomry or respondentia, must describe his particular interest, or the insurance is defective.

The general description, "*goods*, *wares*, and

* Phillips, 64. † 1 Caines, 276. 4 Dal. 421.

merchandize," is most often made use of when the description is meant to apply to a mixed shipment of goods. These words are in legal language very comprehensive, and it would be safe for the merchant always to make use of them when procuring insurance on goods shipped abroad, since by some error, or subsequent arrangement, goods might otherwise be shipped, not covered by the policy.*

Where the merchant is expecting goods, but is not informed of the name of the ship on board of which they are laden, an insurance effected on them described to be "on board of ship or ships to sail, &c." is sufficient to charge the underwriters.†

Where a policy was "on goods from Marseilles to the West Indies, and back by the Amphitrite and other vessel, or vessels," the assured had goods on board of different vessels to a greater amount than was insured, and those shipped first, to the amount insured, arrived safe, and a loss occured on those subsequently shipped—it was held that the policy should apply proportionably to all the goods coming within the description.

Profits. If the policy is intended to cover the profits on the cargo shipped, it must be so expressed, specifically. But where the master insured his "property in the brig Lavina," the court held that the word "property," was a word of very extensive signification, and covered his *commissions* on the cargo on board of the ship.

* Phillips, 66. † 2 H. Bl. 343.

INSURABLE INTEREST.

When a merchant contemplates procuring insurance on any ship, goods, or interest that he conceives he has at risk, it behooves him to first inquire whether or not he possesses an insurable interest in the same. It is essential to every contract of insurance that the assured should have an interest at risk. If he has no interest, or if his interest be not at risk, he can be liable to no loss, and accordingly there is nothing against which the insurer can agree to indemnify him.

It is a general rule, that, in order to have an insurable interest in any subject, a person must be liable to a *direct* and *immediate* loss, by its damage or destruction. Hence a creditor may insure the life of a debtor of his, where the loss of the debtor's life would be the loss of the debt.

Interest of the Mortgagor. The owner of property mortgaged, or in other words, the *mortgagor*, still retains an insurable interest in it to its *full value.*

The assignment of a bill of lading passes the entire and absolute property in the goods to the assignee, and leaves the assignor no insurable interest, provided the assignment was made with the intention to pass the whole interest. But if the assignment is made merely for the purpose of binding a consignment of goods, and the consignor still

retains an interest, then the consignor may have them insured.*

Insurable interest of a Mortgagee. A person to whom the freight of a vessel has been mortgaged, may insure the legal interest on his own account, and also the equitable interest on account of the mortgagor. The *mortgagee* of a ship, or other property, has a legal interest in the thing, and may, therefore, insure; he may represent the property to be his own, and the policy may be in his own name.†

Of a lender or borrower on bottomry. A lender on bottomry, or respondentia, has an insurable interest to the amount of the loan.‡

A borrower on bottomry, or respondentia, may have an insurable interest in the property hypothecated, but he can only insure for the amount which the property is worth, over and above the sum borrowed on the property hypothecated. For instance, if a ship, valued at $10,000, be hypothecated for the sum of $7,000, then the lender may procure insurance on her for the last mentioned sum, and the borrower, or owner of the ship, can only procure insurance for the surplus value of the same, to wit—the sum of $3,000.§

Interest of a consignee, factor, or agent. A consignee, factor, or agent, has an insurable interest in the property consigned to him to the amount

* 1 Esp. 373. 1 Term R. 445. † 1 Browne, 267. 2 N. R. 324.
‡ Phillips' Ins. 43. § 2 Caines' Cases, 110.

of his lien upon the same. In other words he has an insurable interest in the goods consigned to him to the amount of his general balance against the consignor, for to that extent is his lien upon the goods. He may insure his interest; and his interest is only commensurate with the loss he may sustain by the destruction of the property.

Supercargo. A supercargo has an insurable interest in the goods committed to his charge, to the amount of the loss he would sustain should the cargo be lost on the voyage.

Profits. The expected profits on a shipment of goods is insurable. In England the law would seem to be that the insured can, in no case, recover more than the amount of profits which he would have realized, had the goods arrived; but in this country, that rule does not seem to have been adopted; but under a valued policy, the estimated profits will be recoverable, and the court will not consider the point, whether or not a profit would have resulted from the safe arrival and sale of the goods at the port of destination. The estimate in the policy is conclusive, unless fraud is alleged.

Charterer. If the charterer of a ship contracts to pay the owner for the ship in case of her loss, he has an insurable interest in her, and may effect insurance upon her in his own name.*

Interest in freight. The owner of a ship, navigated on his own account, has an insurable interest

* 3 Mass. R. 133.

in the freight. The risk commences as soon as the ship breaks ground.*

Re-assurance. An insurer upon property has such an interest in it as entitles him to procure a re-assurance upon the same, covering no more than the risk he has previously assumed.

The risk which the insurer undertakes to run for the insured, must involve no violation of the laws of the country, where the contract is to be enforced. Hence property employed in trade with the public enemy, cannot, lawfully, be protected by insurance. The risks incident to the evasion of the revenue laws are not insurable.

WHAT RISKS MAY BE INSURED AGAINST.

As a general rule, persons may be insured against any event by the happening of which they may sustain a pecuniary damage. But this rule has its exceptions. A person cannot be insured against the loss which he may incur by *violating the law.* He cannot be insured against the consequences of *wrongful acts.*† Neither can he be insured against losses occasioned by his own *misconduct,* or *culpable neglect.*‡ It has even been thought that a court of law could hardly, upon principle, sustain a contract of insurance, by which a party was to be indemnified against losses arising from his own *negligence.*

* 2 Con. R. 373. † 5 Taunton, 606. ‡ 1 Johns. Cases, 340.

Upon the same principle it has been doubted whether a person may be indemnified against the acts of the government of which he is a subject; but lord Ellenborough said, "that where the assured was a British subject, he might recover against a British underwriter, for a loss sustained by an act of their own government."

But a person may be insured against the consequences of violating the regulations of trade, and the municipal laws of a foreign state.* If the vessel or cargo be seized and condemned in a foreign country for violating their revenue laws, the insurers will be liable to pay this loss, provided it appears by the policy, and the course of trade, that this was one of the risks contemplated by the parties.†

A valid contract may also be made for the purpose of indemnifying the assured against the administration of the laws of nations by a foreign tribunal. It has at times been a common practice in some parts of the United States to insert a provision in a policy containing a warranty of neutral property; that the proof of the property being neutral should be, "made only in the United States." By this clause, the assured was protected by his policy from the errors of foreign courts of law. The character of the property was left to be determined, as between the assured and the underwriters, by the courts of law in the United States.

* 5 Taunton, 37.

† Valin. t. 2, p. 130.

WHAT IS A LOSS WITHIN THE POLICY.

It may, in general, be said, that every thing happening to a ship, in the course of her voyage, by the intermediate act of God, without the intervention of human agency, is a peril of the sea. Thus, every accident happening by the violence of wind and waves; by thunder or lightning; by driving against rocks; by the stranding of the ship; or by any other violence that human prudence could not foresee, nor human strength resist, may be considered a loss within the meaning of such a policy; and the insurer must answer for all damages sustained in consequence of such accident. But if a ship be driven by stress of weather on an enemy's coast, and be there captured, it is a loss by *capture*, and not by perils of the sea.

In order to charge the underwriter for a loss by perils of the sea, the ship must be equipped with every thing necessary for the voyage; she must be *seaworthy*, and have a sufficient crew, and a captain and pilot of competent skill.

The ignorance, and incompetency of the master and mariners, is not a peril of the sea against which the underwriter undertakes to insure.*

It is, however, difficult, oftentimes, to discriminate between damage occasioned by the ordi-

* Phillips, 224.

nary wear and tear of the voyage, which falls upon the owner, and that occasioned by a peril of the sea.

The loss of an anchor by friction of the rocks, the destruction of the ship by worms, the ordinary leakage of fluids in casks, the spontaneous combustion of hemp, are all instances of losses not within the policy. Even damage done to the ship by rats has been questioned, as a loss for which the insurer is not answerable.

If a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it will be presumed that she foundered at sea.

There is no precise time, after which, a vessel that has not been heard of, is to be presumed to be lost; but the presumption must depend upon the circumstances of the case.*

If the vessel be obliged to put in for repairs, and be afterwards lost on the voyage, the insurer is entitled to recover the partial loss from the previous damage and general average thereon, in addition to the total loss. Provided, always, that the assured has paid, or is liable to pay for the repairs of the previous damage, but if money has been raised on bottomry to pay the same, the lender of the money will bear the loss; such being the condition of his bond.†

The enumerated perils of the sea, pirates, rovers and thieves, include the *violent* acts of individuals,

* 2 Johns. R. 150. † 10 Johns., 487.

whether felons, or as a mob, or plunderers from the wreck, and also the plundering, or injury, committed by a mutinous crew. It does not include simple larceny.*

OF PARTIAL LOSS AND ADJUSTMENT.

Partial loss implies a damage which the ship may have sustained in the course of her voyage, from any of the perils mentioned in the policy. When applied to the cargo, it means the damage which goods may have received, without any fault of the master, by storm, capture, stranding, or shipwreck; although the whole, or the greater part thereof, may arrive in port. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. But the usual stipulation contained in American policies, provides that the underwriters shall not be liable for partial losses except they exceed five per cent. This clause, however, does not undertake to exempt the underwriters from their liability to pay *general average* losses to less than that amount. The per centage is to be reckoned on the *valuation* after *deducting the premium*.†

Distinct and successive losses arising from disasters happening at different times, cannot be added together in order to make up the five per cent.‡

The above principle is applicable, only, to losses

* Park, 33. † 7 Pick. 259. ‡ Ibid.

on the ship, and not to losses upon the cargo. If the *aggregate* of the losses upon the cargo exceed five per cent. or whatever the exception may be, the underwriters are liable.*

If, in adjusting the losses under this memorandum, the partial loss be found, on survey and sale, to have been five per cent., the insurer pays the damages and expenses; if less than five per cent., the insurer pays nothing. The expenses are not to be estimated in calculating the loss.

When we speak of the underwriters being liable to pay, whether for total or partial losses, it must always be understood that they are liable only in proportion to the sums which they have underwritten. Thus, if a man underwrites $100 upon property valued at $500, and a total loss happen, he is answerable for $100 and no more; that being the amount of his subscription: if only a partial loss, amounting to 40 or 50 per cent. upon the whole value, he pays $40 or $50, that being his proportion of the loss.

If extra freight and extraordinary expense be incurred in transporting the cargo in another vessel, it is charged upon the insurer. He is also liable for all the labor and expense attendant upon the accident which forces the vessel into port. But these items are more properly termed particular average than partial loss, although the two are frequently

* 2 Sumner, p. 378.

confouuded, and the terms incorrectly used as synonymous.

In adjusting partial losses, the insurer has nothing to do with the state of the markets, or with the loss on landing expenses, or freight and duty accruing in consequence of the deterioration. The loss is to be adjusted only upon a comparison of the gross proceeds of the sound and damaged goods. When a partial loss has occurred, the proper method to ascertain the amount of the loss, is to compare the price which the goods bring in a damaged state, with that which like goods, being sound, would bring at the same time and place. The difference gives the ratio of loss. For illustration, suppose goods of the insurable value of $1,000 are damaged by perils of the sea, and on arrival at the port of destination, or at the port of distress, are sold for $600, and that the expense of surveys and extra charges on the sale is $50. Let it be further supposed that like goods, if sound, would bring at the same time and place $1,200. Upon these data, the adjustment would be as follows:

Value of the goods, if sound, -	$1,200
Value of the same, being damaged,	600
Loss 50 per centum, or, - -	$600
Then $1,000, the cost, or insurable value, losses 50 per cent., or,	$500
Add charges and expenses, - -	50
Claim on the insurers, - -	$550

Where there is no special stipulation, the insurer is not liable for loss occasioned by ordinary leakage. When the leakage is caused by an extraordinary accident, the difference is to be estimated between that and ordinary leakage, and an allowance made for the latter.

If an insurer pay money for a total loss, and in fact it be so at the time of adjustment, and it afterwards turns out to be only a partial loss, he shall not recover back the money so paid to the insured; for substantial justice is done by putting him in the place of the insured, and giving him all the advantages that arise from the salvage.*

An adjustment made by the agent of the insurer does not bind him so far but that he may show it to be erroneous.†

If the goods be valued in the policy at so much per pound, their weight must be estimated according to the standard of the place where the contract was made.‡

In an open policy on the cargo, the invoice price of goods, together with the shipping charges, and premium of insurance, is the value which the insured can recover upon a total loss, and that without any deduction for the drawback on exportation.

By the invoice price of goods, is meant the prime cost. The insured, in an open policy, cannot charge commissions on the purchase of goods by himself, though he may add the premium of insurance.§

* 4 Burr, 1766. † 1 Caines, 444. ‡ 2 Caines, 30. § 1 Burr, 249.

The jury may allow interest on a claim for a partial loss.

In estimating the loss in case of repairs, the insurer is entitled to a deduction of one-third new for old, whether the vessel be old or new.* This applies also to all the apparel of the ship, cordage, cables, &c., except the anchor.†

In estimating the expense of repairs made upon a vessel, for which the underwriters are chargeable, the value of the old materials is to be first deducted from the gross amount of expenses, and then one-third new for old is to be deducted from the balance. If the expense of repairs are $700 and the old materials taken from the vessel, and not used again in her repair, sell for $100, that leaves $600 paid for repairs, to be adjusted between the assured and the underwriter. If the underwriters insured to the full value of the ship, they must pay two-thirds of the above sum, or $400. One-third new for old always being deducted in case of repairs.‡

It is the duty of the master to cause an adjustment, in case of a general average loss upon ship or cargo, upon his arrival at the destined port, and he has a lien upon the cargo for the amount of the contribution.

The underwriters are liable for the casual spliting of sails, parting of cables, springing of masts,

* 1 Caines, 315. 11 Mass. R. 253. 11 Johns. 315.
† Phillips, 371. ‡ 7 Pick. 259.

loss of boats, breaking of the upper works, or any part of the ship; damage by stranding, damage by lightning, or by accidental fires, loss by plunder while the property is for a time in the hands of captors or pirates, damage by running foul of other ships, or being run foul of, or damage sustained by a ship in an engagement. All *casual* and *inevitable* damage and loss that happens to the subject is *particular* average, or partial loss; all sacrifices of the property on board, or of the ship, or her apparel, for the safety of the remaining property, is *general* average.

Where the insurer has underwritten on only a portion of the value of the ship or goods, he contributes towards a partial loss in the same proportion; and the value of the property, whether it be the ship or the goods, is to be estimated at the time of the commencement of the risk.

Freight. A partial loss on freight is occasioned by loss of the ship after a part of the voyage is performed, which makes it necessary to hire another ship to carry on the cargo to the port of destination, in order to earn freight; or a loss of a part of the cargo, whereby the ship is prevented from earning a part of her freight.*

Where, on account of the perils insured against, only freight *pro. rata* is eared, this is a case of partial loss upon that interest.

* 12 Johns. 107.

If the goods arrive in bulk, though, in consequence of sea damage or otherwise, they are of no value, still the whole freight is due, and accordingly the assured on freight has no claim for any loss. In case of the sale of the goods at an intermediate port, however, the whole freight is usually allowed, and in most instances there can be no question of its being due, as it cannot appear that the goods might not have arrived at the port of destination in bulk.

The expenses attending a detention by embargo or other cause, do not constitute a particular average on freight.

There can be no difficulty in adjusting a partial loss on freight, since the whole amount of interest is definitely fixed by the bills of lading or charter party, or, in case of the ship and cargo belonging to the assured, the amount is determined by estimation, according to the current rate of freight for the same voyage, and the whole amount of the interest, and that of the loss being ascertained, the rate per cent. of the loss is readily found.

On Goods. In case of the destruction of a part of the goods, the underwriter pays their value according to the invoice or valuation; and the rule is the same in case of the loss of half of the value of the goods by sea damage, or otherwise, though they remain in bulk.

A particular average is usually adjusted at the port of delivery. If the loss is occasioned by the

entire destruction of a part of the goods insured, the insurer is liable to pay for them, as far as they are covered by the policy, at the price at which they are insured, and such a loss is easily adjusted, there being no difference of opinion or practice respecting it.

If the particular average is occasioned by damage to the goods, and, in consequence of the damage, the goods sell for only half what the same goods would have sold for if sound, the direct loss by the damage is fifty per cent., and the insurer must pay, not half of the price of sound goods at that market, but half of the value at which he insured the goods.

If the goods arrive in a state damaged to half their value, still the same freight is payable. It has been a question of very grave discussion, whether, or not, the loss thus sustained by the merchant, in paying freight, on say $1,000 worth of goods when $500 worth only arrive, should be borne by him or by the underwriters. It is now definitely settled that the insurers are not liable for this loss, nor for losses arising from the port charges, duties, &c, upon such damaged goods.*

* 5 Johns. 219.

MARITIME LOANS.

Bottomry and Respondentia.

Bottomry and *respondentia* are both maritime loans. The former, as its name implies, is a loan upon the *bottom* of the ship, its *tackle*, *apparel*, and *freight*. *Respondentia* is a loan effected upon the *cargo*. The subject pledged on either of such loans is said to be *hypothecated*.

These loans are of very great antiquity, having been in use among the ancient Rhodians, and from them adopted by the Romans, and by almost all maritime nations since their day. The object of hypothecation bonds is to procure the necessary supplies for ships which happen to be in distress in foreign ports, where the master and owners are without credit, and in cases in which, if assistance could not be procured by means of such instruments, the vessels and their cargoes must be left to perish. The owner may also make use of such loans in a home port, to procure funds to purchase a cargo for the ship, or to furnish supplies, and in general to effect any beneficial purpose towards the ship or cargo.* So a valid hypothecation may be made by the owner, for the purpose of raising money, *not for the use of the ship or voyage*, if it be not a mere cover for an *usurious* contract. If

* Kent, 3 vol. 353.

the risk of the voyage be substantially taken, and there be no gaming or fraud in the matter, the contract may be sustained.*

The effect of a bottomry bond is to bind the owner for the repayment of the money loaned, and the agreed maritime interest thereon, in the event that the vessel arrives, *in good safety*, at the port designated; but if the ship be lost by a peril of the sea, the lender has no claim upon the borrower for any part of the loan, except what may come to the borrower's hands as *salvage of the wrecked property*. The lender on *bottomry* becomes, upon the wrecking of the property, its legal owner, and entitled to the proceeds. Hence it will be seen that the lender on bottomry is an insurer in a certain sense. He takes the risk upon himself of her safe arrival, and stakes his money upon the hazard. He is therefore permitted and authorized to demand and receive an extraordinary rate of interest. Where the contract is made by the master in a foreign port, when in distress, and his peculiar circumstances seem to have been taken advantage of for the purpose of extorting an exorbitant rate of interest, maritime courts sometimes interfere and moderate the exorbitancy of the charge. But this is not often done, since it is considered of great importance to commercial transactions, that these loans should be upheld and enforced with honorable fidelity.†

* 1 Peters, 436. † 3 Mason, 260.

A *respondentia bond* is a loan upon a pledge of the cargo. Both *bottomry* and *respondentia* partake of the nature of a mortgage, and both vessel and cargo may be hypothecated in one instrument. Respondentia, or a pledge of the cargo, is, generally, only a personal obligation on the borrower, and is not a specific lien upon the goods, unless there is an express stipulation to that effect in the bond. The condition of the loan is the same as on bottomry, the safe arrival of the subject hypothecated, and the entire principal, as well as interest, is at the risk of the lender, during the voyage.*

After a bottomry bond is once rightfully made, every sale or transfer of the vessel, although the purchaser takes without notice of the bond, is subject to the bond, and the vessel is liable on the hypothecation to the lender. This is the case, whether the hypothecation be made by the owner on a home shore, or by the master on a foreign shore. It is not necessary that the bond should be recorded.† It is necessary, however, that there should be no laches on the part of the lender, if he would hold the ship against a *bona fide* purchaser, without notice. He should libel the vessel within a reasonable time after her arrival from the voyage agreed upon. A bottomry bond may be upon time, as well as for a specific voyage.‡ If the owner, after obtaining advances upon bottomry, sell the vessel, or break up the voyage, the contract of the lender is

* Kent, 3 vol. 355. † 2 Sumner, 157. ‡ Ibid.

at an end, and he may proceed immediately against the borrower, or the vessel, to obtain payment.*

In general, as soon as the risk ceases, either by the ship's safe arrival, the expiration of the term for which the money was loaned, or by the breaking up of the voyage, *the marine interest ceases*, and the debt becomes absolute against the lender.†

After the debt has once become *absolute* against the owner by the safe arrival of the vessel, or any other cause, *legal interest* begins to run upon the amount of *principal and interest then due*, and the marine interest ceases.‡

The lender is only answerable for losses which happen within the time and place of the risk, as specified in the contract. Therefore if the ship *deviate*, without necessity, from the voyage described in the bond, the lender will not be liable, any more than an insurer, to any loss that may afterwards happen.§

The last bottomry bond, like the last will, takes precedence, provided it be given for the purpose of repairing a disaster sustained by the ship, after the execution of the first bond. It is then really made for the benefit of the previous bottomry lender.¶

The lender on bottomry, does not, as does an insurer, assume the risk of barratry, or loss by the fraud or misconduct of the borrower or his agents. The

* 2 Sumner, 157.
† 2 Marshall In. b. 2. ch. 4, p. 750, et. seq.
‡ 3 Mason, 268.
§ 2 Marshall In. b. 2. ch. 5, p. 756,
¶ 2 Sumner, 157.

lender does not bear losses arising from the unseaworthiness of the vessel, or from unjustifiable deviation, or from the fault of the borrower, or the inherent infirmity of the cargo. Nor does he run the risk of the goods shipped on board another ship without necessity.*

A bottomry bond, when made in a foreign port by one of the owners, should, also, it would seem, be signed by the master.

A bottomry bond will take *precedence* of a *prior mortgage* of the vessel, if the mortgagor was allowed to remain in possession.†

If the master should take up more money on bottomry, than the exigencies of the vessel required, still the bond would be good for the sum actually expended upon the vessel. A bond may be good for a part, and bad for a part.‡

By the maritime law of the United States, the master cannot pledge the ship by bottomry bond, and also pledge the personal credit of the owners.§

The master cannot pledge the ship by bottomry bond for repairs, when one or more of the part owners are present where the repairs are made.

The master cannot hypothecate for an existing debt; but only for advances for a purpose necessary to complete his voyage, made at the time the necessity existed.‖

The lender of money on *bottomry* must inform

* Kent, 3 vol. 360. † 1 Paine R. 671.
‡ 8 Peters, R. 538. § Ibid. ‖ Wash. R. 293.

himself of the ship's necessity for the loan; and if he does not, and it appears that part of the sum advanced was *not applied*, or was *not necessary* to the repair of the vessel, the lender loses his lien on the vessel for the amount of the loan *not applied*, or which was *not necessary*, but the bond is good for the remainder.*

The lender on bottomry is bound to exercise reasonable diligence, in order to ascertain whether such supplies and repairs are necessary and proper. He is not bound, however, to show there was a *positive necessity*. It is sufficient that there was an *apparent* necessity, so far as the lender is able, upon due inquiry and due diligence, to ascertain the facts.†

A regular survey, by competent and skillful persons, and repairs made in pursuance of their recommendation, is *prima facie* evidence of the propriety of making the repairs, to justify the master and lender on bottomry.‡

The money should be advanced solely on the faith of the hypothecation, and not on any personal credit, in a foreign port, and in such distress that the voyage could not be completed without it.§

The master of a ship, in a foreign port, has authority to procure all supplies, and repairs, necessary for the safety of the ship, and the due performance of the voyage.‖

* Bee, R. 157. † Ship Fortitude. 3 Sumner.
‡ Ibid. § Ibid. 120. ‖ Ibid.

This authority is not confined to such supplies, and repairs, as are absolutely, or indispensably necessary; but includes all such as are reasonably fit and proper for the ship and the voyage.*

Where such supplies and repairs are reasonably fit and proper, the master, if he has not suitable funds, or cannot obtain money on the personal credit of the owner, may take it upon bottomry.†

The master, before taking up money on *bottomry*, should assure himself that there is no other way in which he can raise the necessary funds. He ought first, certainly, to apply to the consignee for funds and direction, and this, too, even if the consignee resides at another port, distant from that occupied by the vessel. If the distance be great, so as to make it *extremely difficult* to communicate with him, the master may proceed without his advice.

The lender on bottomry is not bound to see to the due application of the money; but there must be no collusion, and he must have reasonable ground for believing that the money is fairly borrowed.‡

OF DEVIATION BY THE MASTER.

Deviation means a *voluntary departure, without necessity*, or any *reasonable cause*, from the regular, and usual course of the specific voyage insured; or it is a varying of the voyage; and it matters not whether the risk is increased or diminished

* Ship Fortitude. 3 Sumner. † Ibid. ‡ 1 Dodson R. 461.

thereby; the effect in either case being the same—to terminate the responsibility of the underwriters. It is necessary to insert in every policy of insurance, the place of the ship's departure, and also of her destination, unless she be insured on time. Hence it is a condition on the part of the insured, that the ship shall pursue the most direct course of which the nature of the case will admit, to arrive at the destined port. If this be not done, and there be no special agreement to allow the ship to go to certain places out of the usual track, or if there be no just cause assigned for such a deviation, the underwriter is no longer bound by his contract. Nor is it at all material whether the loss be, or be not, actually in consequence of the deviation; for the insurers are in no case answerable for any subsequent loss, in whatever place it happens, or to whatever cause attributed. Neither does it make any difference whether the insurers were, or were not, consenting to the deviation.*

The meaning of those who assume the risk of the voyage is always presumed to be, that the voyage is to be pursued in the most direct and safe course, and the adventure conducted, in general, in the most *expeditious* manner, as far as is consistent with safety; and if there be any departure from such course or mode of conducting the adventure, whereby the risks insured against are *varied*, or *increased*, it behooves the assured to justify such de-

* Kent, vol. 3, 313.

parture, by showing either a *usage* in that respect, or a reasonable *necessity* for it.

A deviation is, therefore, not merely a going out of the *direct* or *usual course* of the voyage, but it comprehends *unusual* and *unnecessary delay*. Any thing that *increases*, or *changes* the risks insured against, in the policy, is a deviation.*

The shortness of the time, or the distance, makes no difference as to its effect upon the contract.

If the master of a vessel puts into a port not *usual*, or stays an *unusual* time, it is a deviation and discharges the insurer.†

If there be liberty granted by the policy to *touch*, or to *touch and stay* at an intermediate port on the passage, the better opinion now is, that the insured may trade there, when consistent with the object and furtherance of the adventure, by breaking bulk, or by discharging and taking in cargo, provided it produces no unnecessary delay, nor enhances, or varies the risk.‡

The above privilege is so circumscribed and guarded that no prudent master would exercise the rights there conceded unless the circumstances would *fully* and *clearly* justify it.

Unless there be some usage proved, or some special facts to vary the general rule, the party insured must go to the several places mentioned in the policy, *in the order in which they are named;* to depart from this course is a deviation. If they

* Kent, vol. 3, p. 315. † Ibid. ‡ 5 Pick. R. 51. 2 Johns. R. 264.

are not specifically named, then the insured is to touch at them in their *geographical* order.*

The master, however, may omit to touch at any of the ports first named, and go immediately to a port mentioned later in the policy; but he cannot afterwards visit the previous named ports, in the course of the same voyage, without avoiding the policy.†

For instance, if permission be given in the policy, for the ship to touch at A. B. and C.,—the master may, if he chooses, run direct to B., and if he fails to find a market there, may proceed to C.—but cannot go back to A. without deviating.‡

Where the insured have permission in their policy to touch at certain ports, the permission is to touch for the purposes of the voyage, and not for other, and distinct purposes.

Liberty to touch at a port named in the policy, will not authorize the touching at another, although it is no more out of the usual course of the voyage.§

Where a vessel that was insured from St. Ubes to her *port of discharge* in the United States, on her arrival at a port in the United States, waited there for instructions from the owner, and afterwards proceeded to her *port of discharge*, it was held to be no deviation.

If the insurance be *at* and from a place,—any unusual, and unnecessary delay in commencing the

* 5 Pick. 89. † Ibid. ‡ Ibid. § 7 Bro. P. C. 459.

voyage, after the risk commences, is a deviation. So where the policy is on goods *until landed*,—any unnecessary and voluntary delay to land them is a deviation.

The cause for which vessels most frequently go out of the regular course of the voyage is, to put into the nearest convenient port to refit after some disaster. This is not a deviation, such as to discharge the underwriters, provided the master seeks his port of distress, *directly* and *expeditiously*.

A vessel which has lost a part of her crew, or of which the crew is disabled by sickness, may go out of the course of the voyage to obtain seamen.

A vessel may go out of the usual course of the voyage, or may delay, for the purpose of avoiding capture or any impending peril that is insured against.

It has been held that the master may go out of the usual course of the voyage, to procure intelligence and advice, when any extraordinary circumstance makes it very difficult to determine in what manner to proceed.

Delay, or going out of the course of the voyage, to succor those who are in distress, has been held not to be a deviation. The principle, founded as it so clearly is, upon principles of humanity, is not likely to be called in question, either by insurers or insured.*

But it seems that delay, or the going out of the course of the voyage to save property, is a deviation.†

* Kent, 3 vol. 313. † Kent, 3 vol. 313.

A vessel may go out of her regular course by *stress of weather*. Upon this point the rule is, that whenever a ship, in order to escape a storm, goes out of the direct course of the voyage, or when in due course she is driven out of it by stress of weather, it is *no* deviation.

She need not return to the point from which she was driven, but may pursue her course to her port of destination, by the usual route from the point to which she has been driven.

A deviation may be justified, if done to avoid an enemy or seek for convoy; because it is in truth no deviation to go out of the course of a voyage, to avoid danger, or to obtain protection.

If by the usage of a certain trade, it is customary to stop at certain places lying out of the direct course from A. to B., it is not a deviation to stop there, because it is part of the voyage; but in order to justify the master, there must be a *precise, clear*, and *established* usage upon the subject, not depending upon one or two loose and vague instances.

The effect of the master's deviating from the voyage insured upon, is, to discharge the underwriters from the time of such deviation, and nothing subsequent can restore their obligation.*

Any unnecessary delay during the voyage, whether *at sea* or *in port*, is tantamount to a deviation, and followed by the same consequences.†

And the shortness of the time of a delay, or the

* 13 Mass. R. 68. 7 do. 349. ‡ 9 Mass. R. 436.

distance of a deviation, makes no difference as to its effect on the contract, whether for one hour, or one month, or for one mile, or one hundred miles; if it be voluntary and without necessity, it puts an end to the contract, and the underwriters are discharged.*

If the master voluntarily deviates from the usual route, and the intention so to do is not communicated to the underwriters, or if the deviation be a mistake of the captain, arising from want of ordinary skill or information, the underwriters will be discharged.†

In the case of contraband trade, the master on discovering great danger in pursuing his voyage, as by learning that the port is blockaded, may, (as in case of pirates in the way,) depart from his voyage, seek an asylum in the nearest safe port, or even, if more convenient, return to his original port and wait until the blockade is raised, or the blockading fleet is dispersed, and then may continue his voyage without being chargeable with deviation.‡

If, however, the master, on learning his danger, *abandon* the voyage insured, and either *return home* or proceed on *another* voyage, this will be a deviation by which the underwriters will be discharged.§

If it be the usage in making a voyage to any particular place, on a particular route, to stop at a certain intermediate port; and there be a *necessity*

* 9 Mass. 436. †8 Mass. 308. ‡ 6 Mass. 122. § 7 Mass. 349.

for it, on account of provisions, or water, *without any fault* of the master, the act will not be a deviation.*

BARRATRY.

Barratry has been defined to be, every species of fraud or knavery in the master or mariners, by which the freighters or owners are injured. Mere negligence and inattention to their duty on the part of the master or mariners, is not barratry. Chief Justice Lee said, "that to make barratry it must be something of a criminal nature, as well as a breach of contract; such as running away with the ship, sinking or deserting her, embezzling the cargo, or carrying her a different course from that ordered. It includes every breach of trust with dishonest views." From a review of the decisions on this subject, it appears that any act of the master, or of the mariners, which is of a *criminal nature*, or which is *grossly negligent*, tending to their own benefit, and to the prejudice of the owners of the ship, without their consent or privity, is barratry.†

In the contract of insurance under the usual form of the policy, and where there is no express words limiting it, the insured are bound to furnish a tight, staunch, strong, seaworthy vessel, a capable master and a competent crew; and the insurers are responsible for all disasters which the foresight

* 13 Mass. R. 68. † Phillips In. 230.

of the insured could not have guarded against. Among the disasters which the insured cannot guard against, is reckoned the *barratry*, or *fraud of the master and mariners*. This, therefore, is covered by the policy.

To constitute barratry, it must be *without the knowledge or consent of the owners.*

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen in the act of barratry. It is immaterial whether it take place during the fraudulent voyage, or after the ship has returned to the regular course; for the moment the ship is carried from its right track with an *evil intent*, barratry is committed.

But the loss in consequence of the act of barratry, must happen during the voyage insured, and within the time limited by the policy; for if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and be there moored twenty-four hours in safety, the underwriters are not liable, if, after this, she should be seized for that act of smuggling.

The attempt, by the master, to evade the duties in a foreign port, whereby the vessel is exposed to forfeiture, is held to be barratry.*

Trading with an enemy without the leave of the owner; and for for a neutral to resist search, are acts of barratry.†

Breach of an embargo, is an act of barratry in the master.

* 2 Str. 1173. Phillips' In. 231. † 8 East. 126.

OF TOTAL LOSS AND ABANDONMENT.

As insurance is for the purpose of protecting the merchant from severe and heavy losses arising from shipwreck or disaster, so abandonment is intended to restore to the owner, without delay, his capital, and thereby enable him to engage in some new mercantile adventure. Long interruption to a voyage, and uncertain hopes of recovery, would, often, be ruinous to the business of the merchant; and therefore if the object of the voyage be lost, or not worth pursuing by reason of a peril insured against, or if the cargo be so damaged as to be of little or no value, the insured may abandon the subject to the underwriter and call upon him to pay a total loss. When an abandonment has been made by the owners to the underwriters, the latter stand in the place of the owners and take the subject to themselves, with all the chances of recovery and indemnity. If the ship should be recovered, and proceed, and make a prosperous voyage, the insurer, as owner, would reap the profit.

Under the law of abandonment, as now settled, the owner is not subject to an interruption of his business, as disastrous, nearly, as the disaster itself; but may disentangle himself from the fragments of a broken voyage, by throwing upon the underwriters the burthen of collecting the scattered remnants, and of providing for them a suitable market.

This leaves the merchant free to pursue the regular train of his affairs without those serious interruptions so perplexing to the man of business.

A total loss is one by which the underwriter is liable to pay for as much of the subject as he insures, at its value in the policy. If the value of the property is equal to, or greater than the amount insured upon it, then the underwriter, in case of a total loss, must pay the full amount insured. But if the amount insured *exceeds* the value of the property lost, then the underwriter is liable only for a sum equal to the *actual value* of the subject insured, or the value stipulated in the policy, if the subject be valued in the policy. But in an open policy, if the sum insured is $1,000, and a total loss of the subject ensues, and its value at the time proves to be only $800, then the underwriter is liable to pay the latter sum only.

A loss may be either *total* or *constructively total.* A *total loss* is, as the words imply, an entire destruction of the subject insured, whether it be the ship, or the goods laden on board. This may happen, either by the subject being sunk, burnt, or captured by a public enemy.

In the case of a *total loss*, where the subject is entirely destroyed, no abandonment is necessary. Nor is it necessary, where the master, acting as agent for whom it might concern, has *rightfully* made sale of the shipwrecked property. The proceeds of such sale belongs to the insurers, provided the master was justified in selling.

But the *sale* of vessels, abroad, under the pretence of *necessity*, has led to more litigation than any other question arising under policies of insurance. Ship-masters should bear in mind, that the reports made by surveyors, in foreign ports, which often recommend the condemnation and sale of the vessel, are, in fact, no conclusive justification of that course. Such reports are merely *advisory*, and a sale made in pursuance thereof, will pass no title to the purchaser, against the former owner; nor render the insurers liable for a total loss, unless there is an *actual* and *urgent necessity* for the sale.*

Even if the circumstances seem to be such as to justify an abandonment, it by no means follows that the master should *sell* the vessel. The insurers may prefer repairing her, at an expense beyond that which the master may deem expedient. The general rule is, that whenever the cost of repairing a vessel will exceed one-half the sum at which she is valued in the policy, the loss is to be deemed constructively *total*. But the expense of repairing the vessel must, in fact, exceed three-fourths of the sum at which she is valued in the policy, in order to make out a constructive total loss; *as one-third is to be deducted for new.*† And none of the incidental expenses of supporting the crew, during the repairs, and of proving the

* Winn vs. Col. Ins. Co., 12 Pick. 249. † Ibid.

loss, can be taken into view in making up the sum.*

In numerous suits at law which have been tried in Massachusetts, of late years, the assured has failed to sustain a claim for total loss, after the vessel had been sold abroad.† And in many more cases, have settlements been made with the insurers, without suit, on the principle of a partial loss, notwithstanding the sale of the vessel.

In some of these cases, the master has submitted to a sale of the vessel, under a mistaken impression that it was his imperative duty to follow the advice of surveyors, and in others it has appeared probable that the master himself prompted the condemnation, from a desire to benefit his owners, thinking that the surveyor's report would justify his acts, and the vessel be well disposed of at the sum insured.

Whatever has been the governing motive with the master, the results have been exceedingly disastrous to their owners, and it is therefore of the utmost importance that every man, who has the command of a vessel, should be aware that he is bound, in case of accident, to do with her as a prudent man would were she his own property, and wholly unprotected by insurance. This is the only safe, general rule.‡

* Hall vs. Ocean Ins. Co., 21 Pick. 472.

† Winn vs. Col. Ins. Co., 12 Pick. 279. Hall vs. Ocean Ins. Co., 21 Pick. 472. Orrok vs. Com. Ins. Co., 21 Pick 456. Hall vs. Franklin Ins. Co., 9 Pick. 466.

‡ Gordon vs. M. F. and M. Ins. Co., 2 Pick. 249.

A capture of the vessel by a hostile enemy, or her detention, so as to deprive the owner of her use and enjoyment, constitutes a total loss within the meaning of the policy. But here an abandonment is necessary before the owner can recover for a total loss.

If the vessel is not heard from for a long time, she is considered to be totally lost by perils of the seas. In the case of a vessel that sailed from North Carolina for New York and was not afterwards heard from, Chief Justice Kent said, "that after the laspe of a year, considering the voyage, the presumption that the vessel had perished, was reasonable."*

Constructive total loss. A *technical* or *constructive total loss* may occur without the entire destruction of the property, or by its capture or detention. The question as to what degree of damage, short of shipwreck, and what degree of restraint, short of capture, or the forcible detention of the ship, come within the principles of abandonment, has been the subject of much discussion.

Where any part of the property has been saved, the assured cannot recover, as for a total loss, unless he abandon. So in case of capture, before condemnation, an abandonment is necessary.†

An abandonment is an act on the part of the assured, by which he *relinquishes* and *transfers* to the underwriters his insurable interest, as far as it

* Phillips, 384. † 1 Term R. 608.

is a subject of the policy, or the proceeds of it, or the claims arising from it.

No particular form is necessary to make a valid abandonment. It is not indispensably necessary that it should be in writing. But in whatever form it is made, it ought to be *explicit*, without any *reservation* whatever. The assured must yield up to the underwriter, all his right, title, and interest in the subject insured; for the abandonment, when made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy.*

But in making an abandonment, it would be well for the assured to make use of the word "abandon," because that is a technical word, and leaves no doubt as to its meaning. The accident, occasioning the abandonment, should be described with certainty. The insured is bound by the causes of abandonment which he assigns, and if that cause is insufficient, he cannot avail himself of a subsequent accident, without making a new abandonment.†

In regard to capture, or restraint of the ship and cargo, there is no distinction between the different subjects of insurance, as the same arrest or detention constitutes a total loss of ship, cargo, and freight. But where the cargo is detained without

* 4 Peters, 139. † 1 Term R. 181.

the ship, or the ship without the cargo, then the subject *detained*, is only liable to abandonment.

The insured has a right to abandon to the underwriters, immediately on the capture of the vessel, without waiting for her condemnation; and even if she be afterwards restored, it does not affect the abandonment, if it was made before the restoration of the ship by the captors.*

An embargo, or detention by a friendly power, constitutes a total loss, and warrants an immediate abandonment.†

So, too, where the vessel is prevented from entering any of the ports mentioned in the instructions, and compelled to terminate her voyage at a place to which she had been ordered by a vessel of war, the voyage is broken up, and the assured may abandon to the underwriters.‡

It is laid down as a general rule, that the assured on any subject may abandon, when the voyage is *broken up*, in respect to that subject, by the perils insured against. But precisely what may be considered a breaking up of the voyage is not so easy of explanation.

"The right of abandonment," says Mr. Justice Story, "has been admitted to exist where there is a *forcible dispossession* or *ouster* of the owner of the ship, as in cases of capture; where there is a moral restraint, or detention, which deprives the

* 4 Cranch, 29. † 4 Cranch's R. 29. 2 Cond. R. 13.
‡ 4 Dall. 417.

owner of the free use of the ship, as in case of *embargoes*, *blockades*, and *arrests;* where there is a present total loss of the physical possession and use of the ship, as in case of *submersion*, or *sinking of the ship;* where there is a total loss of the ship for the voyage, as in case of *shipwreck;* and, lastly, where the injury is so extensive, that by reason of it, the ship is *useless*, and the making repairs would *exceed her value.* The right to abandon, exists, whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage, is *uncertain* or *unreasonably distant*, or the risk and expense are disproportionate to the expected benefit and objects of the voyage."*

If the voyage be broken up by a loss of the cargo, this does not give a right to abandon the ship. The underwriters on the cargo and freight are answerable in such a case; but the owner of the ship has suffered no loss, and, therefore, cannot abandon, and claim for a total loss. The insurer on the ship has nothing to do with the cargo. The underwriters insure against loss or damage to the vessel, not the cargo. They insure her ability to perform the voyage, not that she shall perform it.

Wreck, or stranding of the ship. The most usual cause of a *technical total loss*, arises from the

* 3 Mason, 27.

wreck, or stranding of the ship. To ascertain whether or not a loss is *constructively total*, two preliminaries must be established. First, the value of the subject insured; and, second, the amount of loss sustained.

Of the value of the subject insured. Where the ship is insured under a valued policy, the value laid in the policy is conclusive, in case of a total loss,—that is to say, if the loss *proves* total. But in the preliminary investigations to ascertain whether or not the loss is *partial* or *total*, it has been a question whether the *value in the policy* or the *actual value* of the ship at the time of the disaster, is to be taken, to ascertain whether or not the loss is to the amount of one-half of her value.

In giving an opinion upon this question, in the case of Peele vs. the Merchants Insurance Company, Mr. Justice Story gave the opinion of the court in favor of opening the policy, and of admitting testimony as to the actual value of the ship, notwithstanding the policy was a *valued one.**

Mr. Phillips, in his treatise on the law of insurance, would seem to lean against the ruling in that case; and from the acknowledged difficulty of proving the value of any ship at a given period, the value alleged in the policy might be expected to govern, in every case where the valuation was not grossly disproportionate to her real value. In making this estimate, the premium note is not to

* 3 Mason, 27.

be deducted from the gross amount of the valuation.

By the introduction of a special clause into the policies in use in Massachusetts, prompted by the above decision, the difficulties on this point have been much narrowed. The valuation in the policy is *prima facie* evidence of her real value.*

Where the policy is an open one, the value of the vessel must be estimated at the time of the happening of the disaster, and not her value at the commencement of the voyage. But it is very unusual to insure vessels in an open policy, at the present time.

Of the amount of damage. It is a well settled rule of American Insurance law, that if a vessel is damaged by any of the perils insured against, so that the necessary repairs to restore her to her former state, and render her seaworthy, will exceed three-fourths of her value before the disaster, the owner is not bound to repair, but may abandon as for a total loss.†

The injury is usually spoken of as an injury to more than half her value, because, in estimating the repairs, one-third of the amount is deducted on the ground that the vessel is made more valuable by substituting new materials for old. Thus, if a ship worth $4,000, is so injured as to require $3,000 to be expended in repairs, it is estimated that the new materials used, will make the vessel

* 12 Pick. 279. † 3 Wendall, 662.

worth $5,000 when repaired; and deducting one-third new for old, the expense of restoring the vessel to her former value will be $2,000, or one-half of her value at the time of the disaster.*

Hence, if a vessel valued at $4,000, sustains an injury to such an extent as to require $3,000 to be expended in her repair, the owner may abandon her to the underwriters and claim as for a total loss.

This is the rule established and adhered to by the court of errors in the state of New York, and the same principle seems to be generally, though vaguely, admitted in a case in Pennsylvania, reported in the fifth of Seargent and Rawle, p. 501. Under the form of policy used in Massachusetts, the above principle is fully established.†

But Mr. Justice Story held, in the case of Peele vs. The Merchants Insurance Company, that the half value of the ship, which authorized an abandonment, was half the sum which the ship would be worth after repairs made. And to this opinion the learned Chancellor Kent, in his commentaries, evidently leans.‡

This latter decision has, however, been provided against by a special clause in the Boston policies, by which it is agreed, "that the insured shall not have the right to abandon the vessel, for the amount

* 3 Wendall, 662. † 12 Pick. 279. 21 Pick. 472.
‡ 3 Mason, 27. Kent's com. vol. 3. p. 331.

of damage merely, unless the amount which the insurers would be liable to pay under an adjustment, *as of a partial loss*, shall exceed half the amount insured."

Hence, under the Boston form of policies, the ship must receive injury to the amount of three quarters of her value, to enable the owner to abandon her to the underwriters, and claim as for a total loss.

The items of expense which fall under the head of general average, such as wages and provisions of the crew, during the detention for repairs; and indeed none of the incidental charges which do not go directly to the repair of the damage, are to be taken into view in making up the sum necessary to justify an abandonment.*

But the expense of getting a stranded vessel afloat, or of raising one that is sunk, though not subject to a deduction of one-third, may be reckoned to make up the one-half of the value in the policy.†

The method of ascertaining whether or not a loss be constructively total, is, usually, by procuring a survey of the vessel, and an estimate of the cost of repairing her. This survey should be made, if possible, by three, at least, disinterested and skillful persons. The appointment of this committee of survey, should, when convenient, be entrusted to

* 21 Pick. 472. † 11 Pick. 90.

the consul, or commercial agent of the port, or to some magistrate residing near the place of the disaster.

In the cost of repairs, is to be included the cost of the removal of the vessel from the place of stranding, the expense of working her into port for repair, as well as the actual expense of putting the repairs upon her.

The estimates in the survey may be based upon the price of labor and materials at the port at which she may then lay; or, if the vessel be in a situation to proceed to another port, not unreasonably distant, where the same may be obtained cheaper, then they may be based upon the cost of repairing her at another port.*

Stranding. When a ship is stranded, the assured cannot, for that cause merely, immediately abandon. By some fortunate accident, by the exertions of the crew, or by extraneous assistance, the ship may again be floated, and rendered capable of pursuing her voyage. In such case the insurers are only answerable for the expenses occasioned by the stranding. But undoubtedly, when by the stranding, the voyage is defeated, the owner may abandon. If the ship be stranded on a part of the coast where no assistance can be procured to get her off, or where there may be no materials or workmen for repairing the damage she may have sustained, or if the insurer, upon having notice, will not engage

* 21 Pick. 472.

to pay the expenses of the attempt to set her afloat, if the owner should not succeed; in a case like this, the voyage is lost, and the insured may abandon.*

A ship may be driven upon some of our beaches without sustaining essential injury, but in good weather she may be easily got off and repaired, so as to prosecute her voyage. In such case, there is no excuse for saying that the owner may immediately abandon, unless the time of her recovery and repair is unreasonably distant, so as wholly to defeat the voyage, or unless the insurers refuse to be answerable for the expense of the attempt to float her. For in this case, as he cannot recover more than a total loss, he shall not be holden to labor for the recovery of the ship, which he must do at his own expense, if he should be unsuccessful.†

And where the stranding is under such circumstances that the attempt to recover and repair the ship, in a reasonable time for the prosecution of the voyage may be hazardous, but not hopeless; if the underwriter will engage to pay all the expenses, whatever may be the event, the owner cannot abandon until he has used such reasonable endeavors to recover his ship, and has eventually failed.‡

If the underwriter will himself undertake, at his own expense, for the owner, the recovery of his ship, and shall succeed, and offer to restore her to

* 6 Mass. R. 184. † Ibid. ‡ Ibid.

him, so that he may reasonably prosecute his voyage, the owner cannot abandon; for neither the ship nor the voyage is lost.*

It is provided in most policies, that "in case of any loss or misfortune, it shall be lawful for the insured, his factors, servants, and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the said (*subject insured,*) or any part thereof, without prejudice to this insurance, to the charges whereof the said insurance company will contribute, in proportion as the sum insured is to the whole sum at risk."

Whether the above provision would bind the insurers for any expenses incurred in a *fruitless* attempt to float a stranded vessel. *Quere.*

If a ship insured for a given voyage, arrive at her port of destination, and there remain twenty-four hours moored in safety; or if she be insured for a term, and she survive the term; any injury which she may have sustained during her voyage, in the one case, or during the term in the other, *however great*, can only amount to a partial loss. The owner cannot abandon.†

The owner may always repair, if he pleases, even if the damage exceeds the half of the value of the ship.‡

The master should protest against every disaster with which he meets in the course of the voyage.

* 6 Mass. R. 484. † 15 Wendell, 458. ‡ 8 Johns. 244.

This protest must be made and sworn to before a justice of the peace, and should be done within twenty-four hours after arriving at the next port, after the happening of the disaster.

Where an abandonment is made by the insured to the underwriter, the protest of the master, if it can be obtained, is the usual evidence of the loss.*

The master then should transmit a certified copy of his protest, or the original itself, where it can be done without danger to the owners, in all cases where an abandonment is to be made upon the disaster protested against.

An abandonment is good, or not, according as the facts concerning the property abandoned justified, or not, the abandonment *at the time* it was made.†

An abandonment once rightfully made, is conclusive, and the rights flowing from it are not divested by any subsequent events, which change the situation of the property.‡

If, therefore, an abandonment be made of a stranded vessel, and at the time of *stranding* and *survey* she be a proper subject for abandonment, and afterwards, and before an abandonment be actually made, she floats from her place of peril, and can be repaired for less than one half of her value, the owner cannot abandon.§

But if a total loss has actually taken place by

* 4 Mass. 88. † 3 Mason, 429. 4 Cranch, 29. 6 Mass. 479.
‡ 3 Mason, 27. § 11 Pick. 90.

capture, or otherwise, and during the *continuance* of such total loss, the owner abandons to the insurer, he may recover, although subsequently the vessel should be given up, or rescued from the captors.*

But the owner cannot abandon after the vessel has been liberated.

Notice of an intention to abandon should be given the underwriters within a reasonable time after the owner receives information of a total loss. Any unnecessary delay in giving such notice, will amount to a waiver of the right to abandon, and give the insurers a right to reject the abandonment.†

But an omission to abandon, will not deprive the assured of his right to recover the actual loss he has sustained.‡

The owner should never buy in, for his own account and benefit, a vessel abandoned by him to the underwriters, because it is considered a waiver of the abandonment.§

In one case the delay of a month, and in another, 45 days, was considered an unreasonable time to delay an abandonment.‖

If an abandonment is once *rightfully* made, the master, from that time, is the agent of the insurers, and no act of his can prejudice the rights of the owner under the abandonment. He is no longer

* 11 Pick. 90. † 1 Mass. R. 264 6 do. 465. ‡ 2 J. R. 138.
§ 10 Johns. R. 177. 3 do. 39. ‖ 4 Mass. R. 668. 6 do. 465.

the servant of the owner, and therefore the owner is no longer responsible for his acts.*

Acceptance of an Abandonment. Although an acceptance may supply any merely formal insufficiency in the abandonment, an acceptance is not in any other respect necessary to its validity and effect; the abandonment being made in due form, and for sufficient cause, it transfers the subject and perfects the assured's rights to recover for a total loss, although it is not accepted by the insurers.

An acceptance, to be binding upon the insurers, must be made by a person authorized to accept. The silence of the insurer is no presumption of an acceptance.

Chief Justice Parsons decided that the taking possession of the vessel by the insurers, after an abandonment, for the purpose of recovering and repairing her, was no acceptance of the abandonment. Mr. Justice Story leans to a different opinion.†

By the form of policy made use of by the Boston offices, it is provided "that the acts of the insured, or insurers, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment." This healthful provision in the policy secures to each party to it, the very necessary and highly proper privilege of rescuing the property from destruction after an abandonment, if it be in

* 3 Mass. 238 and 417. † 6 Mass. 581. 3 Mason, 27.

their power. It saves them from the unnatural and and painful necessity of standing by, and seeing property go to destruction, and barred themselves from extending a saving hand, by a most unreasonable point of law.

OF THE ABANDONMENT OF THE CARGO.

A TOTAL loss of the ship and an abandonment of her is not necessarily followed by a total loss of the cargo. The whole, or a principal part of the cargo may be saved and sent on to its port of destination; or it may be accepted by the merchant at the port of distress; in either of which cases the assured cannot abandon to the underwriters.*

Where the vessel meets with a disaster in the course of the voyage, and puts into a port of distress, and the cargo is there found to be damaged to an amount exceeding *one-half* of its value, the assured may abandon it to the underwriters and claim for a total loss.†

It matters not whether this loss arises from the deterioration of the goods by sea-water or otherwise, or from the absolute destruction of a portion of them, if half of the value of the goods is lost, whether by the destruction of a part of the goods or deterioration in value of a part or the whole, the assured may abandon.‡

Where the cargo consists partly of memorandum

* 1 Johns. 335. † 6 Pick. R. 131. ‡ Phillips, 415.

articles, insured *free from partial loss*, and the cargo sustains damage, the damage to the *non* memorandum articles must exceed *half* of the value of the whole cargo, memorandum articles and all, in order to entitle the owner to abandon.*

If more than *half* the goods insured are thrown overboard for the safety of the remaining interests, the owner may abandon in the same manner as if the loss was by inevitable peril.†

The insured is not authorized to abandon the cargo, after its arrival at the port of destination, however great the damage may be.‡

If the vessel and goods are taken by an enemy, the assured may immediately abandon. So, too, if they are embargoed in a foreign port, or prevented by blockade from entering the port of destination, it is a good cause of abandonment.§

Where the vessel is driven into an intermediate port in distress, it does not, for that cause merely, give the owner of the cargo a right to abandon. The vessel's having been disabled, does not, in all cases, constitute a loss of the voyage in respect to the cargo. The master may, in such case, repair his own vessel, if it can be done; or otherwise he may hire another, and if it is through his *fault* and *negligence* that neither is done, this does not give the assured any right of abandonment, since the insurers are not at the risk of the *conduct of the captain* in this respect.

* 8 Cranch. 48.
† 2 Caines's Cas. 324.
‡ 4 Binney, 506. Benecke, 370.
§ 8 Mass. R. 494.

If the cargo is not damaged to an extent exceeding *one-half* of its value, it must be sent on by the ship-owner, if the vessel can be repaired in a reasonable time to carry it forward; or, if another vessel can be procured at the port of distress, or a neighboring port to carry it on for a price less than one-half of its value, the master is bound to send it forward. If in neither of these ways the cargo can be sent forward to its port of destination, and the owner does not see fit to accept it at the port of distress, he may abandon.

If a vessel can be obtained at the port of distress, or a neighboring port, to carry on the cargo, or if the vessel can be repaired within a reasonable time, so as to carry it on, the assured cannot abandon, unless the expense of procuring another vessel would exceed half the value of the cargo. If the master *can* procure another vessel to send the cargo forward and *will not*, the better opinion seems to be that the insurers are discharged.*

Valuation of the cargo. The invoice value of the goods must be taken as their value for the settlement of the question whether or not they have been injured to more than *half their value.* In the invoice value may be legally included, not only the prime cost of the goods, but also the expense of removing them and lading them on board, and the premium of insurance.†

If goods, in a port of distress, are found to be

* 9 Johns. 21. † Kent's Com. vol. 3. p. 272.

damaged, and the question is, whether, or not, the damage exceeds the half of their value, it may be ascertained in this way. Ascertain, first, the market value of the goods in that place, in a *sound* state, and then ascertain the market value of the goods as they *are* in a damaged state. If it appears that they are deteriorated for that market to more than half their value, the merchant may legally abandon them to the underwriter, since the presumption is fair, that the relative proportion between the value of sound and damaged goods will be the same in every market. For instance, if the cargo consists of coffee and might have been sold at 80s. sound, and is, in consequence of its being damaged, worth no more than 40s., the proportion of the loss is one-half, for the owner is by the deterioration placed in the same condition, (as to the goods themselves,) as if one-half of the goods had been washed overboard.*

SALVAGE.

Salvage is a compensation to those by whose assistance a ship, or its loading, is saved from impending peril, or rescued from actual loss. This service may either take place at sea, or on the shore, and entitles the salvor to a greater or less reward, according to the circumstances of the case.

* Benecke, 15.

It is generally from one-third to one-half of the value of the property saved. Formerly a certain portion of the property was decreed the salvors, but now it is usual to adjudge them a certain portion of the value of the property saved, in money. In fixing the rate of salvage, the court usually has regard, not only to the labor and peril incurred by the salvors, but also to the situation in which they may happen to stand with respect to the property saved; to the promptitude and alacrity manifested by them, and to the value of the ship and cargo, as well as the degree of danger from which they were rescued. Sometimes it is a matter of contract between the salvors and owners as it respects their compensation; but unless it appears clear to the court that no undue advantage was taken of the situation of the owners, by the salvors, they will not consider it binding. Generally the ship's crew cannot be the salvors of their own vessel or cargo; but under certain circumstances the court have allowed them salvage. So, too, with pilots and passengers.

In cases of shipwreck, where the voyage, as to purposes of freight, is wholly lost, but by the meritorious exertions of the crew the materials of the ship are saved, they are entitled to salvage; for the loss of freight, carrying with it their wages, places them, in cases of extraordinary exertion, upon the

same right as other persons, to be paid a compensation for their labor done.*

If a vessel in distress is abandoned at sea by the master and all the crew, excepting one man, who is left by accident or design, he is discharged from his contract as mariner of that vessel, and may entitle himself to salvage.†

An agreement made in distress at sea is void.‡

It has been held that where part of a ship's crew, with the mate at the head, went on board a vessel, *quasi derilict*, to effect a salvage, the part of the crew who remained in their own ship, if equally ready to go, were equally entitled to the reward.§

In case of shipwreck, it is the duty of seamen to exert themselves to the utmost to save as much as possible of the vessel and cargo. If the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, it seems upon principle that the seamen are also entitled to a proportion of their wages; and for their labor in saving the cargo, or remains of the ship, they, as well as other persons, may be entitled to a recompense by way of salvage.‖

In case of shipwreck, although the contract of the sailors is not at an end, and it is their duty to remain and labor to save the wreck and cargo, they are entitled by way of salvage to their wages, which form a lien on the property saved. Where

* 2 Mason's R. 319. † 2 Cranch R. 240. ‡ Bee R. 138, 139.
§ 2 Dodson R. 132. ‖ 2 Mason's R. 319.

the danger in rescuing property from a wreck is great, it may form a claim on the part of the sailors for compensation, even beyond their wages.‡

The right of salvage is forfeited by embezzlement on the part of the salvors whether in port or at sea.†

Spoliation, smuggling, and other gross misconduct of the salvors may forfeit all claim to salvage.*

If property, abandoned by the master and crew, be taken possession of by one set of salvors, a second set have no right to interfere with them and become participators in the salvage, unless it appears that the first would not have been able to effect the salvage without their aid.

Where property was taken out of the hands of the original salvors, by a second party, and it appeared in evidence that their assistance was not needed, salvage was decreed to the original salvors only.

If a vessel belonging to citizens of the United States, be taken by a foreign enemy, and before condemnation be retaken by a public vessel of the United States, the vessel thus retaken reverts to its former owners, they paying a salvage of one-eighth of the value of the vessel and cargo to the recaptors; or if retaken by a private vessel of the United States, one sixth of the value thereof is allowed as salvage.

* 2 Mason's R. 319. † 1 Sumner, 328. ‡ Ibid.

If public vessels of the United States be retaken from an enemy, before condemnation, they revert in the United States, and a salvage is allowed by law to the recaptors, if retaken by a public vessel, of one-twelfth part, and if retaken by a private vessel, one-sixth part of the true value thereof, as found by any court of the United States competent to try the same. And for the recapture of a public armed vessel, or any goods therein, one moiety of the true value thereof, when made by a private vessel of the United States, and one-fourth part of such value when made by a public armed vessel of the United States.

OF GENERAL AVERAGE.

General average is a maritime phrase. It is the contribution of *several* interests to repair a loss sustained for their general safety. General, or gross average, means a contribution made by all parties concerned, whether it be in the ship, cargo, or freight, towards a loss *voluntarily* sustained by some of the parties in interest for the benefit of all.

No loss can be a subject of general average, unless two things concur :—first, that it be *intentionally* made ; and, second, that it be made for the general *safety* and *benefit* of the remaining interests. The goods must not be swept away by the violence of the wind or waves, for then the loss falls entirely upon the merchant or his insurer.

When goods are thrown overboard for the safety of the ship and remaining portion of the cargo, it is the foundation for a general average claim, and is called a *jettison*. The jettison must be made for sufficient cause, and not from groundless timidity. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of the storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies. If, when thus situated, a portion of the goods are thrown overboard as the price of safety to the rest, and the ship and residue of the cargo be saved thereby, nothing is more reasonable than that they should bear their proportion of the loss. The doctrine of general average is one of those rules of the marine law which is built upon the plainest principles of justice, and it has accordingly recommended itself to the notice and adoption of all the commercial nations of the world.*

A jettison is only permitted in cases of extreme necessity, and if the master, in case of *false* alarm, makes a jettison, there is no contribution. A regular jettison, says Emerigon, is that which takes place with order, and without confusion, and is founded on previous deliberation. Consultation is not indispensable previous to the sacrifice. A case of imminent danger will not permit it. But it must appear that the act occasioning the loss was the effect of *judgment* and *will;* and there may be a

* Kent, vol. 3, p. 232.

choice of perils when there is no possibility of safety. There must be a certain loss, *voluntarily* incurred for the common benefit, and it is not necessary that the vessel should be exposed to greater danger than she otherwise would have been.

To avoid an absolute shipwreck, it may sometimes be necessary to run the vessel ashore in a place which appears to be the least dangerous, and that will form a case of general average.*

The master should first begin the jettison with things the least necessary, the most weighty, and of the least value; and nothing but the greatest extremity would excuse the master who should commence the jettison with money, and other precious parts of the cargo.

Before contribution takes place, it must appear that the goods sacrificed were the *price of safety* to the rest; and if the ship be lost, notwithstanding the jettison, there will be no ground for contribution.† But in such case the loss must be total, so that no value is saved by means of the sacrifice; it being a well settled rule, that where any property is saved, contribution is due, as it is the safety of the property, and not of the voyage, which constitutes the consideration of general average.‡

All damage arising immediately from jettison, or other act of necessity, is to be a matter of general average, and, therefore, if, in cutting away a mast, the cargo, by that means, be injured, the damage

* 4 Binney, 513. † Kent, 3 vol. 234. ‡ 13 Peters, S. C. R. 331.

goes into general average. So, if a ship be injured by a peril of the sea, and be obliged to go into port to refit, the wages and provisions of the crew during the detention, constitute the subject of general average according to the decisions in New York and Massachusetts. In Great Britain and her dependencies, it is different,—no contribution being allowed for those charges. In France seamen's wages and provisions may, under certain circumstances, be a subject for contribution. The usage throughout the United States is to consider the wages and provisions a subject of general average in all cases of *voluntary* departure from the course of a voyage to repair damages. But it is manifest that this, like all other subjects of general average, is founded upon the supposition that an actual *sacrifice* has been *voluntarily* made for the common benefit. It is equally plain that there can be no voluntary sacrifice, unless the voyage is *intentionally prolonged* to avoid the danger of keeping the sea in a crippled vessel. Mere detention, therefore, in the ordinary course of the voyage, is no sufficient ground for a general average claim.

If damage occurs to a ship while in port, but ready for sea, and she be thereby detained for repairs, the wages and provisions, during the detention, are not considered general average, because the detention is *involuntary;* but if the damage happens after she has broken ground for the voyage, and she puts back to refit, then the detention is deemed *vol-*

untary, and the wages and provisions are brought into contribution. So if a vessel is bound to two or more ports, and meets with a disaster on the passage towards the first, but arrives there, and is detained for repairs, the wages and provisions during such detention, are not general average. And again, if a ship is accidentally stranded, and afterwards got afloat in such a condition that she is unfit to proceed on her voyage, and is therefore taken into a neighboring port for repairs, there is no voluntary prolongation of the voyage for the common safety, and consequently the wages and provisions are not a subject for contribution.

The claim for general average upon wages and provisions begins to run immediately from the time the ship departs from the course of her voyage, and continues until she is ready for sea at the port of necessity. Formerly it was held that the allowance should be continued until the ship regained the same position in respect to the completion of the voyage, that she was in at the time she put away. That is to say, if a ship had performed half her voyage, and was then compelled to return to her port of departure, the wages and provisions were allowed until the period when she had again completed half her passage. This rule, however, for obvious reasons was found to be of difficult application ; and it has now been long settled, that the wages and provisions shall be allowed from the time the master *determines to put away* for a port

of necessity, until the vessel shall be again ready to proceed on her voyage; or until the voyage is broken up; if, as often happens, the ship is condemned, or the enterprise abandoned, at the port of necessity.

The rule is laid down by Marshall thus: "Where a ship is forced to enter a port to repair the damage she has suffered in a storm, being unable to continue her voyage without apparent risk of being lost, the wages and provisions for the crew from *the day it was resolved to seek a port to refit the vessel, to the day of her departure from thence*, &c., shall be brought into a general average."*

Notwithstanding the apparent simplicity and clearness of this language, the question is frequently made, whether the wages and provisions ought to be allowed, until there is an actual *departure* from the course of the voyage, towards the port of destination, in order to make an intermediate port. For instance, if a ship meets with damage near the *Cape of Good Hope*, being bound to Boston, and the master immediately determines to put into *St. Helena*, it is contended that the course of the vessel towards Boston will, generally, carry her in sight of the island, and therefore that there can be no practical *putting away* or *departure* from the course of the voyage to go into *St. Helena*, until the ship has sailed several hundred miles on her regular track. Hence it is argued that the allow-

* Marshall, book 1, chap. 13, sec. 7.

ance for wages and provisions should not commence until the ship turns off to put into Jamestown, which would probably be the very day she would arrive there. There is much force in this argument, and it is conformable to the views of many of the most intelligent and liberal underwriters in Boston; but, on the other hand, it may be said, that the abrogation of the ancient rule, which continued the allowance until the ship regained her former position, and the adoption of that cited from Marshall should be deemed a kind of compromise, and that the latter should be as strictly enforced for the *advantage* of the ship owner, as it would be *against* him, under different circumstances. Let it be supposed that the ship met with the disaster, as far this side of St. Helena, as the Cape of Good Hope is on the other, and was compelled by the course of the winds to return to that island; then it would be obvious that the wages and provisions during the time she was proceeding again on the homeward voyage, until she reached her former position, would be sacrificed for the common benefit, yet the rule laid down by Marshall, and practically applied in all cases, would exclude any allowance beyond the day she was ready for sea at *St. Helena.*

Where the general safety requires a ship to go into port to refit, by *reason of some peril*, not only the wages and provisions of the crew, but the other necessary expenses of going into port and of preparing for refitting the ship, by unloading, ware-

housing, and reloading the cargo, are general average.* In these expenses may be included port charges, pilotage, light money, unloading and reloading the cargo, coopering casks when rendered necessary by the unloading of the cargo, storage, hire of anchors, cables, or boats; wages of people employed to guard the property, or to cut the ice in order to get the ship into, or out of port, brokerage, postage, fees of notaries for protests, &c.; and in general all the expenses incidental to the interruption of the voyage for the general safety.†

The costs of the repairs, so far as they accrue to the ship alone as a benefit, and would have been necessary in that port on account of the ship alone, are not average. Yet, if the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been defered with safety to the ship, to a less costly port, such *extra expense* is general average.‡

If part of the cargo be *voluntarily* delivered up to a pirate or an enemy, by way of ransom or contribution, and to induce them to spare the vessel and residue of the goods, the property saved must contribute to the loss, as being the price of safety to the rest. The expense, also, of unlading the goods to repair damages to the ship, or to lighten her when grounded, must be sustained by general contribution; for all the parties concerned are interested in the measures requisite for the prosecu-

* 2 Pick. 8. † Phillips, 347. ‡ 7 Pick. 259.

tion of the voyage. If the masts, cables, and other equipments of the vessel be cut away, to save her in a case of extremity, their value must be made good by contribution. All *casual* and *inevitable* damage and loss, as distinguished from that which is purposely incurred, is the subject of *particular*, and *not* of general average.*

If the ship be *voluntarily* stranded to escape danger from tempests, or the chase of an enemy, the damages resulting from that act are to be borne as general average, if the ship be afterwards recovered and perform her voyage. But if the ship be wholly lost or destroyed, by the act of running her ashore, it has been a question much discussed and different opinions entertained, whether the cargo saved was bound to contribute to bear the loss of the ship. But the question was elaborately considered by the supreme court of the United States in the case of the Columbian Insurance Company, plaintiffs in error, vs. Stribling, et al. 13 Peters, 331, in which the whole doctrine of general average was fully discussed, and the total loss of the ship by such voluntary stranding was held to be the subject of contribution.

A temporary safety is all that is requisite to entitle the owners of the property sacrificed to contribution; and if the ship survives the disaster, and be afterwards lost by another, still the goods saved, in the second disaster, must be contributory to the

* Kent, vol. 3, p. 238.

original loss, for without that loss they would have been totally destroyed.

Goods *shipped on deck* contribute if saved, but if lost by jettison, they are not entitled to the benefit of general average; for they, by their situation, increase the difficulty of the navigation, and are peculiarly exposed to peril.*

There is much diversity of practice among those whose profession it is to adjust averages in this country. In several of our principal ports there are usages strictly local. The establishment of a uniform system would prove highly beneficial to the commercial interests, and is, therefore, very desirable; but it will not be accomplished, probably, until Congress shall deem it expedient, under their constitutional power to regulate commerce, to establish a code after the manner of the French ordinance of the marine.

At present the rule in New York is to allow thirty cents a day for the wages of the crew during a voluntary detention for repairs, and in some of the southern ports thirty-three cents per day is allowed. In Boston the allowance is twenty-five cents per day. In New York the rule is to take one-half of the gross freight, and four-fifths of the sum at which the vessel may be valued in the policy, as the contributory value of those interests. In Boston two-thirds of the freight and the actual value of the vessel are taken. In Philadelphia the

* Kent. vol. 3, p. 239.

rule is to deduct one-third for new, from the gross amount of repairs, and then to deduct the proceeds of the old materials from the remainder. In Boston and New York, the proceeds of the old materials are first deducted, and then one-third of the remainder for new. In New York it is usual to allow in general average a commission of two and one-half per cent for collecting it. In Boston, such an allowance is deemed wholly inadmissible.

As a general rule, the goods sacrificed, as well as the goods saved, are to be valued at the clear net price they would have yielded, after deducting freight at the port of discharge; and this rule is founded on a plain principle of equity. The person whose loss has procured the safe arrival of the ship and cargo, should be placed on equal ground with those persons whose goods have safely arrived, and that can only be done by considering his goods to have also arrived. The owners of the ship contribute according to her value at the end of the voyage, and according to the net amount of freight and earnings. The net amount of freight is determined by deducting one-third of the gross amount at risk. This is an arbitrary rule, analagous to that of deducting one-third for new in case of repairs. It has been adopted for convenience to avoid the necessity of inquiry, in every case, to determine what has been the actual net earnings. In New York one-half of the gross freight is deducted, leaving a moiety for contribution.

The value of the vessel for contribution is her true worth at the port of adjustment. This is to be ascertained in the best manner that circumstances will permit. If she has been repaired at a port of necessity, the amount of such repairs must be deducted from her value at the port of destination. Thus suppose a vessel to be sold on her arrival, or her value to be established by competent appraisers, at - - - - - - - - - $10,000

And that she has been repaired at the port of necessity at an expense of - 3,000

Her net contributory value is - $7,000

This rule for finding the contributory value is manifestly the only correct one, because the result gives the precise value saved by the ship-owner. But as neither an actual sale, nor an appraisement can always be resorted to conveniently, it is usual to proceed as follows:

Take the value in the policy, assumed to be at the inception of the contract, $10,000

Deduct the repairs at the port of necessity, assumed to be - - $3,000

Less one-third, deduction new for old, - 1,000–$2,000

Premium, included in the valuation, - - - $500—2,500

Leaving the contributory value, $7,500

But it often happens that the arbitrary valuation in the policy is incorrect, and it follows, therefore, that it should not be taken as an element to determine the contributory value, if the point can be otherwise ascertained.

It is not unfrequently the case that occasions arise for fixing the contributory value of vessels, which have sustained no extraordinary damage, but have been running some time after the value in the policy was established. In such cases, it is customary to make an allowance for deterioration, thus:

Suppose the vessel valued in the policy at - - - - - - - -		$10,000
That the premium is - -	$500	
And that she has run a year or more without repairs; allow for deterioration, say - -	1,500	—2,000
Leaving the contributory value, -		$8,000

In New York four-fifths of the value in the policy is taken as the contributory value of the vessel, unless she has met with damage, and undergone repairs amounting to more than one-fifth of such valuation, in which case the actual amount of the repairs is deducted in lieu of the one-fifth.

Thus suppose a vessel to be valued at	$10,000
And a general average is to be adjusted before any disaster has befallen her, one-fifth is deducted, - - -	2,000
Leaving her contributory value,	$8,000

But suppose she has run two years under the policy and is impaired by wear or tear, as she might well be, *one-half*, and an average then occurs, still, according to the practice in that port, one-fifth only is deducted, and she contributes on $8,000.

If, however, she meets with damage, and is repaired at an expense of $3,000, or of any sum above $2,000, then the amount of such repairs is deducted from her original valuation, and she is made to contribute on the balance. This rule is manifestly obnoxious to many objections, and is recommended only by its convenience.

In fact, the inquiry to be made, in all cases, is simply this,—*how much value has been saved by the sacrifice?* This is to be determined by reducing the several interests to their net cash prices, at the port of destination, deducting all charges, so as to find how much more each party concerned possesses than he would have done, had a total loss happened. The *value* saved by each party thus determined, is the true contributory value,—and the method which will establish the fact the most clearly, is the best.

As to losses of the equipment of the ship, such as masts, cables, and sails, it is usual to deduct one-third from the price of the new articles; for being new, they will be of greater value than the articles lost.*

* Kent, vol. 3, p. 242.

The doctrine of adjustment underwent a very full discussion in Strong vs. The New York Fireman's Insurance Company, and it was there declared to be the *duty* of the master, in cases proper for a general average, to cause an adjustment to be made upon his arrival at the port of *destination*, and that he had a lien upon the cargo to enforce the payment of the contribution.* This was shown to be the maritime law of Europe. When the general average is thus fairly settled in the foreign port, according to the usage and law of the port, it is *binding*, though settled *differently* from what it would be in the *home port*. If, however, it is not a proper case for a general average, and s a partial loss only, then this doctrine does not apply, and a foreign adjustment, founded in mistake, and assuming a case for general average, when none existed, is not binding.

* 11 Johns. R. 323. 2 Barnw. and Cress, 805. 3 Johns. cases, 170. 4 Mawle and Selw. 141.

CHAPTER XVI.

MARINE HOSPITALS.

In the session of Congress which ended in July, 1798, a system of taxation upon seamen was adopted, intended for their temporary relief, when sick or disabled. This tax is twenty cents per month, and is assessed upon all American seamen, or seamen employed in the United States Merchant service. By the aid of this fund, marine hospitals have been erected in the principal commercial cities of the United States. The extent of the relief which these Hospitals afford to that useful class of our citizens, is circumscribed in a great measure by the amount of the funds collected. As far as practicable, the expenditures have been kept within the amount of the collections from the seamen; so that while the government have the ordering and disposal of this money, and the general direction of the several hospitals, it contributes little or nothing to their support. Each hospital is, in the main, supported from the collections made within its own district, which districts are designated by the President, or the Secretary of the Treasury.

The time has now arrived when the government should remodel the whole system, and the marine hospitals be placed on a more liberal footing. The

government is now abundantly able, not only to bear the whole expense of the institutions already established, but to establish others at points where the growing interests of commerce now pressingly demand them. There is no subject more richly meriting the attention of Congress than this, and it is to be hoped that it will be speedily brought before it. If there is any class who deserve the watchful and even tender regard of the government, it is the mariners; for it is through their toils and privations that our country has been enriched by foreign commerce, and their gallantry has won for her imperishable honors in the memorable engagements recorded in her naval history. Simple justice should award to them, from their country, a warm and comfortable retreat when overtaken by sickness or disaster, if their proverbial thoughtlessness and improvidence, combined with the exposure of their situation, did not imperiously demand it.

The marine hospitals of the United States are only intended for the *temporary relief* of sick and disabled seamen. Hence, if a seaman be afflicted with *mania*, consumption, or any other kind of incurable disorder, he is not permitted to partake of the benefits of the hospital. If the complaint developes itself as incurable after the patient has been admitted into the hospital, he is immediately discharged.

Seamen who are sick with complaints which are

deemed *curable*, are not permitted to remain in the hospital for a longer period than four months.

When a disabled seaman is discharged from any hospital on account of having an incurable disease, or by reason of having exhausted the four months allowed for his stay in the same, he is entitled to be conveyed by water, at the public expense, to his place of nativity or domicil, where he may either obtain the aid of his friends, or claim the protection of the place as a pauper.

Terms. No charge whatever is made to *American* seamen for any relief afforded by marine hospitals. Whatever may be the circumstances of the seaman, he is entitled to its benefits without fee or reward.

Foreign Seamen who are sick, are admitted, when it can with convenience be done, into the various marine hospitals of the United States, upon the application of the master or commander of the vessel to which such sick seamen belong. Each seaman, so admitted, is subject to a charge of seventy-five cents per day, for each day he remains in the hospital. The master of the vessel is liable for the same.

When the seamen are in such a state of convalesence as to admit of it, they must perform such reasonable service as the surgeon may direct.

All officers of the navy, and of the marines, and all seamen and marines in the public service of the United States, and all officers and seamen in the

merchant service, may be admitted into the hospital, whenever, from wounds, sickness, or infirmity, it may become necessary; unless the disorder, with which they are visited, is contagious or malignant.

While the seamen are receiving the benefits of the hospital, they are not permitted to leave the grounds about the same, without permission from the steward.

APPENDIX.

NOTICE OF ABANDONMENT.

To A. B., President of the Commercial Insurance Office, Boston.

You will please to take notice, that I, C. D., of *Newburyport, in the County of Essex*, merchant, abandon to you all my right, title, interest, property and claim in and to the ship *Roscoe and her cargo*, and every part and parcel of *them or either of them ;* and I demand of you the sum of *ten thousand* dollars, by you underwritten on my interest in said ship and cargo, as for a total loss thereof. C. D.

Boston, March 1, 1839.

NOTE. No particular form of abandonment is necessary, and even an abandonment made verbally, *if not objected to*, is good. It is best, however, to use the word *abandon*, because that is a technical word adapted to express the intention of the insured. If the abandonment is to be sent abroad, it is prudent to have it made, in a formal deed, by a conveyancer or notary.

ASSIGNMENT OF A POLICY OF INSURANCE.

Know all men by these presents, that I, the within named A. B., for, and in consideration of the sum of *fifty d llars*, to me paid by C. D. of &c., the receipt whereof is hereby ac-

knowledged, have sold, assigned, transfered, and set over, and by these presents I do absolutely sell, assign, transfer and set over to him, the said C. D., all my right, property, interest, claim and demand, in and to the within policy of insurance, which have already arisen, or which may hereafter arise thereon, with full power to avail himself of the interest herein assigned, or hereby intended to be assigned. The conveyance herein made, and the powers hereby given are for myself and my legal representatives, to said C. D. and his legal representatives.

In testimony whereof, I, the said A. B., have hereunto set my hand and seal this second day of March, in the year of our Lord one thousand eight hundred and thirty-nine.

ASSIGNMENT OF A SAILOR'S WAGES.

To all persons to whom these presents shall come, A. B., of &c. [here name his place of residence, county, state and occupation,] sends greeting.

Know ye that I, the said A. B., for and in consideration of the sum of , in which I am justly indebted to C. D., of &c., have hereby assigned, sold, and set over, and by these presents, I do hereby assign, sell, and set over, unto the said C. D., all such sum or sums of money as are now due and owing to me, the said A. B., for wages or services on board the ship or vessel called the *Experiment*, from the master or owner of the said vessel, on board of which vessel I served as a mariner on her voyage from *Boston* to *Halifax*, which has recently terminated. And to enable the said C. D. the better to recover and receive the same, I do hereby appoint him, the said C. D., my attorney irrevocable, with full power in my name, but at his charge, to prosecute any and all persons liable therefor, and receive and recover the same, and give discharges therefor.

And I do covenant with the said C. D., that I have not assigned or released the above named sum or sums of money

to any other person or persons whatever, and that I will, at his request, and at his charge, execute to him all and every further conveyance and assurance that may be deemed necessary to enable him fully to avail himself of the benefit of this assignment.

In testimony whereof, &c.

A. B. [seal.]

LETTER OF ATTORNEY FROM A SAILOR TO HIS WIFE TO RECEIVE HIS WAGES, &c.

I, A. B., of &c., mariner, do constitute and appoint my loving wife, C. B., my true and lawful attorney, for me, and in my name, and for my use, to ask for, demand, and receive, of and from all and every person and persons whatsoever, as well all such sum and sums of money as now are, or which shall or may at any time hereafter beeome due and owing to me for wages, from any ship or ships to which I now do or may belong; as also all and other monies now due, or to become due and owing to me by any other ways or means whatsoever; and upon non-payment either of the whole or of any part of the said pay, or other demands, I do hereby authorize and empower my said wife to bring a suit or suits in law, in my name, for the recovery thereof.

In witness whereof, I have hereunto set and affixed my hand and seal this day of, &c. A. B. [seal.]

Signed and sealed in presence of us.

ASSIGNMENT OF MONEY DUE FOR FREIGHT OF A SHIP.

To all persons to whom these presents shall come, I, A. B., of &c., send greeting.

Know ye, that in consideration of the sum of *ten dollars*, to me paid by C. D., of &c., the receipt whereof is hereby acknowledged, I, the said A. B., have granted, sold, assigned and set over, and I do hereby grant, sell, assign and set over to the said C. D., the one full and equal thirty-second part of

all such sum and sums of money, as are remaining due and owing from all persons for or on account of the ship *Decatur*, of , of the burthen of about three hundred tons, O. P. master, for the freight, hire or service of the said ship or otherwise, and payable, or belonging to me the said A. B., as the owner of the said thirty-second part of the said ship, whereof I am at this time the owner: and all my right, title, interest and property of, or in the same:

To have and to hold the same to the said C. D., his executors, administrators, and assigns, to his and their use and behoof forever.

[*Add a power of attorney to collect and recover the same. For form see* "assignment of sailor's wages."]

In witness whereof, &c.

Attest. A. B. [seal.]

ASSIGNMENT OF MONEY DUE FOR FREIGHT, &C.

[*another form.*]

To all persons to whom these presents shall come, I, A. B., of &c., master of the good ship or vessel called the *Morning Star*, send greeting.

Whereas I, the said A. B., by a charter party or instrument, in writing, dated on the second of March, 1838, did let on freight, to O. P., of &c., the one-half of the said ship, on, and for a voyage then about to be performed by said ship from *Boston* to *Baltimore*, which voyage has been performed, for the sum of *one hundred dollars*, which is now due and payable by said O. P. to me. Now, therefore, know ye, &c. [*as before.*]

AGREEMENT FOR THE FREIGHT OF A SHIP.

Articles of agreement made this *second* day of *May*, in the year eighteen hundred and *thirty-nine*, between A. B., master and commander of the ship *Liverpool*, of *Boston*, of about five hundred tons burthen, now at the wharf in *Charleston*, in

the state of *South Carolina*, and bound on a voyage to *Bristol*, in the *kingdom of Great Britain*, of the one part, and C. D., of said *Charleston*, merchant, of the other part.

The said A. B., for the consideration hereinafter named, does covenant with the said C. D., that the vessel aforesaid shall, with all reasonable expedition and despatch, be made ready to proceed to sea, and well found, manned and provided in all respects to undertake a voyage from where she now lies, to *Bristol* aforesaid, and that he the said A. B. will forthwith receive on board the said vessel, for the said C. D., provided he will furnish the same, the goods described as follows: [*here enumerate them,*] and within *twenty days* from the day of the date hereof, wind and weather permitting, the said A. B. will sail with the said vessel for the said port of *Bristol*, and on arriving there, the dangers of the seas and other maritime risks excepted, he will deliver the said goods in the like good order in which they shall be received on board said vessel, to the said C. D. or his assigns. And the said C. D. covenants with the said A. B. that he will forthwith deliver, on board his said vessel, to be transported as aforesaid, the goods herein before enumerated; and that on their transportation as aforesaid to the said port of Bristol, he will receive the same from on board the said vessel, and then and there on the receipt thereof, that he will pay to the said A. B for the transportation thereof, the sum of [*here name the freight and primage.*]

In witness whereof, &c. [seal.]

FORM OF A BOTTOMRY BOND.

Know all men by these presents, that I, A. B., of *Boston*, in the county of *Suffolk*, in the commonwealth of *Massachusetts*, one of the United States of America, ship-master, in the sum of ten thousand dollars, good and lawful money of the United States, to be paid to the said E. F., his executors,

administrators and assigns, to which payment well and truly to be made, I do hind myself, my heirs, executors and administrators, and every one of them, firmly by these presen's.

Sealed with my seal, and dated the first day of March, A. D. one thousand eight hundred and *thirty-two*.

Whereas the above bound A. B. hath taken up, and received of the said E. F. the full and just sum of *five thousand dollars*, which sum is to run at respondentia on the block and freight of the ship *Exeter*, whereof the said A. B. is now master, from the port or road of *Bombay*, on a voyage to the port of *Boston*, having permission to touch, stay at, and proceed to all parts and places within the limits of the voyage, at the rate or premium of *twenty-five per cent.* for the voyage; in consideration whereof, usual risks of the seas, rivers, enemies, fires, pirates, &c., are to be on account of the said E. F. And for further security of the said E. F., the said A. B. doth by these presents mortgage and assign over to the said E. F., his executors, administrators and assigns, the said ship Exeter and her freight, together with all her tackle, apparel, &c. And it is hereby declared that the said ship Exeter and her freight are thus assigned over for the security of the respondentia taken up by the said A. B. and shall be delivered to no other use or purpose whatever, until payment of this bond is first made, with the premium that may become due thereon.

Now the condition of this obligation is such, that if the above bound A. B., his executors, or administrators, shall and do, well and truly pay or cause to be paid unto the said E. F. his executors, administrators or assigns, the full and just sum of five thousand dollars, being the principal of this bond, together with the premium which shall become due thereupon, at or before the expiration of ninety days after the safe arrival of the ship Exeter at her moorings in the port of Boston, or in case of the loss of the said ship Exeter, such an average as by custom shall have become due on the salvage, then this obligation to be void and of no effect, otherwise to remain in full force and virtue. Having signed to three bonds of the

same tenor and date, the one of which being accomplished, the other two to be void and of no effect.

A. B. for self and C. D. } [seal.]

Signed, sealed and delivered in presence of us.
G. H.
J. K.

FORM OF A BOTTOMRY BILL.

To all men to whom these presents shall come. I, A. B. of *Bengal*, mariner, part owner and master of the ship called the *Exeter*, of the burthen of five hundred tons and upwards, now riding at anchor in *Table Bay*, at the *Cape of Good Hope*, send greeting:

Whereas I, the said A. B. part-owner and master of the aforesaid ship called the *Exeter*, now in prosecution of a voyage from *Bengal* to the port of *London*, having put into *Table-Bay* for the purpose of procuring provisions and other supplies necessary for the continuation and performance of the voyage aforesaid, am at this time necessitated to take up, upon the adventure of the said ship called the *Exeter*, the sum of *one thousand pounds* sterling monies of *Great Britain*, for setting the said ship to sea, and furnishing provisions and necessaries for the said voyage, which sum C. D. of the *Cape of Good Hope*, master attendant, hath at my request lent unto me, and supplied me with, at the rate of *twelve hundred and twenty pounds* sterling for the said *one thousand pounds*, being at the rate of *one hundred and twenty-two pounds*, for every *hundred pounds* advanced as aforesaid, during the voyage of the said ship from *Table-Bay* to *London*. Now know ye, that I, the said A. B. by these presents, do, for me, my executors, and administrators, covenant and grant to and with the said C. D. that the said ship shall, with the first convoy that shall offer for *England* after the date of these presents, sail and depart for the port of *London*, there to finish the voyage aforesaid. And I, the said A. B. in consideration of the sum of

one thousand pounds sterling to me in hand paid by the said C. D. at and before the sealing and delivery of these presents, do hereby bind myself, my heirs, executors and administrators, my goods and chattels, and particularly the said ship, the tackle and apparel of the same, and also the freight of the said ship which is or shall become due for the aforesaid voyage from *Bengal* to the port of *London*, to pay unto the said C. D., his executors, administrators or assigns, the sum of *twelve hundred and twenty pounds* of lawful British money, within thirty days next after the safe arrival of the said ship at the port of *London* from the same intended voyage.

And I, the said A. B. do, for me, my executors and administrators, covenant and grant to and with the said C. D., his executors and administrators, by these presents, that I, the said A. B. at the time of sealing and delivering of these presents, am a true and lawful part-owner and master of the said ship, and have power and authority to charge and engage the said ship with her freight as aforesaid, and that the said ship, with her freight, shall at all times after the said voyage, be liable and chargeable for the payment of the said *twelve hundred and twenty pounds*, according to the true intent and meaning of these presents.

And lastly, it is hereby declared and agreed by and between the said parties to these presents, that in case the said ship shall be lost, miscarry, or be cast away before her arrival at the said port of *London* from the said intended voyage, that then the payment of the said *twelve hundred and twenty pounds* shall not be demanded, or be recoverable by the said C. D., his executors, administrators, or assigns, but shall cease and determine, and the loss thereby be wholly borne and sustained by the said C. D., his executors and administrators, and that then and from thenceforth every act, matter, and thing herein mentioned on the part and behalf of the said A. B. shall be void, any thing herein contained to the contrary notwithstanding.

In witness whereof the parties have interchangeably set

their hands and seals to four bonds of this tenor and date, one of which being paid, the others to be null and void.

At the *Cape of Good Hope*, this 15th day of *November*, in the year of our Lord one thousand seven hundred and ninety-seven.

Witness, { E. F. G. H. I. K. } A. B. [seal.]

THE FORM OF AN INSTRUMENT OF HYPOTHECATION OF SHIP AND CARGO.

KNOW all to whom this instrument of bond and bill of maritime risk and bottomry may come, that in the year from the birth of our Lord Jesus Christ, 1801, on the 31st day of the month of *January*, in the city of *Lisbon*, in my office personally appeared *Jacomo Mazzola*, captain of the *Imperial* ship called the *Gratitudine*, whom I know to be the real person; and he declared to me, the notary, in the presence of the witnesses hereinafter mentioned, that within twenty-four hours after the arrival of his said ship at *London*, or any other port, and previous to beginning to make any delivery of the cargo at the port aforesaid, or any other port, that he, the captain, or whomsoever may act in lieu of him, or in the case of his absence, perform the duties of his said quality, shall or will pay by this bill of risk, sea exchange, and bottomry, to *Francis Manoel Calvert*, professed in the order of Christ, or to his order the sum of 5,273*l.* 12*s.* sterling, principal and premium of risk and sea exchange, at the rate of 16 *per cent.* the which principal he acknowledged to have received here of the said *Francis Manoel Calvert*, in the good current money of this kingdom, under the denomination of true and legitimate money of sea exchange and bottomry, on the hull, keel, and appurtenances of the aforesaid ship, and therewith to supply the wants of the repairs, caulking, and of the cargo of the same, on which he had effectively invested it: the said *Calvert* taking upon himself, and in consideration of the afore-

said premium of 16 *per cent.* voluntarily agreed for and settled between them, to run the sea risk on the said hull, keel, and appurtenances, and cargo of the said ship, in her ensuing voyage, which the said captain is about prosecuting from this port of *Lisbon* to that of *London:*—these being the risks which the aforesaid *Francis Manoel Calvert* takes on himself, and is to run, such as of the sea, winds, fire, stranding, and shipwreck, enemies, and false friends, detentions of princes, and reprisals, during the whole of said voyage, excepting nevertheless those of barratry of the master, and of average, as well particular as general, the which are expressly excluded; the which risk shall commence to run from the hour the ship shall heave her first anchor to set sail from this port to that of *London*, and shall cease in twenty-four hours after having come to anchor: and for the ready payment of the aforesaid sum, he, the captain, binds himself, and his effects in general, dues and funds, both in actual possession and future, and by special mortgage the cargo, freights due, or that may become due; and in case of failure of the prompt payment in due time, he binds himself under this clause of mortgage to pay to him or his order, for all the delay until full payment, at and after the rate of *six per cent. per annum;* and there being also present *Andrew Belucci*, mate of the said ship, by whom it was declared, that in case of the absence of the aforesaid captain, he bound himself to fulfil the contents of this bond they thus executed and accepted, after these presents were read to them, and I, the notary in the name of whomsoever it may concern, being absent; to all which were witnesses present, *Joav Pedro Roeks*, who also acted as interpreter as well for the captain as for the mate, he being there vice-consul, and *Manoel Eugenio Coetho*, who together with the parties signed thereto. *J. Joge de Almeida Rorig* the notary wrote it: *Jacomo Mazzola, Andrew Bellucci, Joav Pedro Roeks, Manoel Eugenio Coetho;* and *J. Joge de Almeida Rorig*, notary public of notes in the city of *Lisbon* and its district of his Royal Highness the Prince Regent our Lord, whom God preserve, caused this instrument

to be transcribed from my book of notes, to which I refer myself, and have subscribed it, and signed it in public form.

In testimony of the truth,

JOGE DE ALMEIDA RORIG.

Whose hand writing is certified by

FRANCIS ARBOUIN,

Vice-Consul.

Francis Manoel Calvert.

FORM OF A RESPONDENTIA BOND.

Know all men, &c. [*Form the same as in the preceding Bottomry Bond.*]

Whereas the above named E. F. has, on the day of the date above written, advanced and loaned unto the said A. B. and C. D. the sum of *five thousand dollars*, upon the goods, merchandizes and effects, laden and to be laden on board the good ship *Exeter*, of the burden of 300 tons or thereabouts, now riding at anchor in the harbor of *Boston*, outward bound to *China* or elsewhere, and whereof the said A. B. is commander.

Now the condition of this obligation is such, that if the said ship or vessel, do and shall, with all convenient speed, proceed and sail from and out of the said port of Boston, on a voyage to any port or place, ports or places, in the *East Indies*, *China*, *Persia*, *or elsewhere beyond the Cape of Good Hope* and from thence do and shall sail, return and come back into the said port of Boston, at or before the end of thirty-six calendar months, to be accounted from the day of the date above written, and there to end her said intended voyage, (the danger and casualties of the seas excepted;) and if the said A. B. and C. D., or either of them, their, or either of their heirs, executors, or administrators, do and shall within thirty days next after the said ship or vessel shall be arrived at her moorings in the said port of *Boston* from her said intended voyage; or at or upon

the end and expiration of the thirty-six calendar months, to be accounted as aforesaid, (which of the said times shall first and next happen,) well and truly pay or cause to be paid unto the said E. F., his executors, administrators or assigns, the full sum of six thousand eight hundred dollars, together with fifty dollars per calendar month, for each and every calendar month, and so proportionally for a greater or a lesser time than a calendar month, for all such time, and so many calendar months as shall be elapsed, and run out of the said thirty-six calendar months, over and above twenty calendar months, to be accounted from the day of the date above written ; or if in the said voyage, and within the said thirty-six calendar months, to be accounted as aforesaid, an utter loss of the said ship by fire, enemies, men-of-war, or any other casualties, shall unavoidably happen, and the said A. B. and C. D. or either of them, their, or either of their heirs, executors, or administrators, do, and shall, within six calendar months next after such loss, well and truly account for, (upon oath if required,) and pay unto the said E. F., his executors, administrators or assigns, a just and proportional average on all the goods and effects of the said A. B. carried from Boston on board the said ship or vessel, and the net proceeds thereof, and on all other goods and effects which the said A. B. shall acquire during the said voyage, for or by reason of such goods, merchandizes and effects, and which shall not be unavoidably lost ; then the above written obligation to be void and of none effect, else to stand in full force and virtue.

BILL OF EXCHANGE.

Boston, July 4, 1832.

$500.

Ten days after sight, pay to the order of Mr. A. B., five hundred dollars, value received, and charge the same without further advice to the account of C. D.

Messrs. E. F. & Co.,
New York.

A SET OF BILLS.

No. 344, Ex. £100 stg. Boston, July 4, 1832.

Sixty days after sight, of this my first of exchange, (second and third of same tenor and date not paid,) pay to Messrs. A B. & Co., or order, one hundred pounds sterling, value received, and charge the same, without further advice, to

C. D.

Messrs. E. F. & Co.,
London.

A SET OF BILLS.

No. 344, Ex. £100 stg. Boston, July 4, 1832.

Sixty days after sight, of this my second of exchange, (first and third of the same tenor and date not paid,) pay to Messrs. A. B. & Co., or order, one hundred pounds sterling, value received, and charge the same, without further advice, to

C. D.

Messrs. E. F. & Co.,
London.

A SET OF BILLS.

No. 344, Ex., £100 stg. Boston, July 4, 1832.

Sixty days after sight, of this my third of exchange, (first and second of the same tenor and date not paid,) pay to Messrs. A. B. & Co., or order, one hundred pounds sterling, value received, and charge the same, without further advice to

C. D.

Messrs. E. F. & Co.,
London.

FORM OF MANIFEST OF CARGO.

Report and manifest of the cargo laden on board of the brig whereof is master, which cargo was taken on board at burthen tons, built at in the state of and owned by at the and bound for

Marks.	Numbers inclusive.	Packages and contents.	By whom shipped.	To whom consigned, or if to order.	Place of Consignee's residence.	Ports of destination.

If any articles of the outward cargo are brought back, they are to be detailed, specifying by whom shipped outward, and to whom consigned inward.

FORM OF MANIFEST OF PASSENGERS.

Names of Passengers.	Age.	Sex.	Occupation.	Last place of residence.	Where bound.	Died on the passage.	Packages belonging to each.

FORM OF A BILL OF SALE OF AN ENROLLED SHIP.

To all persons to whom this present bill of sale shall come, [here insert the grantor's name, residence, &c.]

Send greeting.

Know ye that I, the said A. B., for and in consideration of *one thousand dollars* to *me* in hand, well and truly paid, at or before the ensealing and delivery of these presents, by C. D., the receipt whereof *I* do hereby acknowledge, and *am* therewith fully and entirely satisfied and contented, have granted, bargained and sold, and by these presents do grant, bargain, and sell unto the said C. D. all the hull or body of the good ship *Mary*, together with all and singular her (tackle, apparel, sails, rigging, &c. &c.) now lying in *safety* and *moored* at the port of *Boston;* the certificate of whose enrolment is as follows, to wit:

No. 56, *Enrolment*, in conformity to an act of the Congress of the United States of America, entitled "an act for enroling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same,

having taken or subscribed the required by the said act, and having that citizen of the United States, is sole owner of the ship or vessel, called the of whereof is present master, and as he hath is a citizen of the United States, and that the said ship or vessel was and having certified that the said ship or vessel deck and mast and that her length is her breadth her depth and that she measures tons; that she is has and head; and the said having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said has been duly enrolled at the port of

Given under hand and seal at the port of this day of in the year one thousand eight hundred

To have and to hold, the said granted and bargained ship

and premises, with the appurtenances, unto the said C. D., *his* heirs, executors, administrators or assigns, to *his* only proper use, benefit and behoof forever. And *I*, the said A. B. do avouch *myself* to be the true and lawful owner of the said ship *Mary* and her appurtenances, and have in *myself* full power, good right, and lawful authority to dispose of the said ship *Mary* and her appurtenances, in manner as aforesaid. And furthermore *I*, the said A. B., do *furthermore* hereby covenant and agree to warrant and defend the said ship *Mary* and appurtenances, against the lawful claims and demands of all persons whatsoever, unto *him*, the said C. D.

In witness whereof *I*, the said A. B., have hereunto set *my* hand and seal the *second* day of *May*, in the year of our Lord one thousand eight hundred and *thirty-nine*.

Signed, sealed and delivered
in presence of us.

FORM OF A CHARTER PARTY.

This charter party of affreightment, indented, made, and fully concluded upon, this *second* day of *May*, in the year of our Lord one thousand eight hundred and *thirty-nine*, between A. B. of Boston, &c., owner of the good ship *Emily*, of the burthen of *three hundred* tons, or thereabouts, now lying in the harbor of *Baltimore*, whereof C. D. is at present master, on the one part, and E. F. *of Baltimore, &c.* on the other part, witnesseth:

That the said A. B. for the consideration hereafter mentioned, hath letten to freight her, the aforesaid ship Emily, with the appurtenances to her belonging, for a voyage to be made by the said Emily, from said *Baltimore* to *Boston*, where she is to be discharged, (the dangers of the seas excepted;) and the said A. B. do, by these presents, covenant and agree with the said E. F. in manner following, that is to say, that the said ship *Emily*, in and during the voyage aforesaid, shall be tight, staunch, and strong, and sufficiently tackled and apparelled with all things necessary for such a vessel and

such a voyage ; and that it shall and may be lawful for the said E. F., his agents or factors, as well at Boston as at Baltimore, to load and put on board the said *Emily* loading of such goods and merchandize as they shall think proper, contraband goods excepted.

In consideration whereof, the said E. F. doth, by these presents, agree with the said A. B. well and truly to pay or cause to be paid unto him in full for the freight or hire of the said *Emily*, and appurtenances, the sum of *five hundred dollars per month*, and so in proportion for a less time as the said ship *Emily* shall be continued in the aforesaid service, in *ninety* days after her return to *Baltimore*, or in *ninety* days after the said voyage shall be otherwise, in any manner whatsoever, determined, and notice thereof to the said E. F. been duly given.

And the said E. F. doth agree to pay the charge of victualing and manning the said ship *Emily*, and *her* port charges and pilotage during said voyage, and to deliver said *ship* on her return to *Baltimore*, to the owner aforesaid or *his* order.

And to the true and faithful performance of all and singular, the covenants, payments and agreements aforementioned, each of the parties aforenamed binds and obliges himself, his executors, and administrators in the penal sum of dollars, firmly by these presents.

In witness whereof the parties aforesaid have hereunto interchangeably set their hands and seals the day and year above written.

Signed, sealed and delivered
in presence of us.

FORM OF A SHIPPING PAPER.

It is agreed between the master and seamen or mariners of the master, now bound from the port of for that, in consideration of the monthly or other wages, against each respective seaman's or mariner's name hereunto set, they

severally shall and will perform the abovementioned voyage; and the said master doth hereby agree with and hire the said seamen or mariners for the said voyage, at such monthly wages or prices, to be paid pursuant to this agreement and the laws of the Congress of the United States of America, and the custom and usage of the port of

And they, the said seamen or mariners, do hereby promise and oblige themselves to do their duty, and obey the lawful commands of their officers on board the said vessel, or on board the boats thereunto belonging, as becomes good and faithful seamen or mariners; and at all places where the said vessel shall put in, or anchor at, during the said voyage, to do their best endeavors for the preservation of the said vessel and her cargo, and not to neglect or refuse doing their duty by day or night, nor shall go out of the said vessel, on board of any other vessel, or on shore under any pretence whatsoever, without leave first obtained from the captain or commanding officer on board. That in default thereof they will be liable to the penalties mentioned in the act of Congress, for the government and regulation of seamen in the merchants' service, in which it is enacted, "that if any seaman or mariner shall absent himself from on board the ship or vessel without leave of the master or officer commanding on board; and the mate or other officer having charge of the log book, shall make entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself; and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay, for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the the use of the owners of the said ship or vessel; and moreover, shall be liable to pay to him or them all damages which

he or they may sustain by being obliged to hire other seamen or mariners in his or their place.

And it is further agreed by both parties, that each and every lawful command which the said master may think necessary hereafter to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, be strictly complied with under the penalty of the person or persons disobeying, forfeiting his or their whole wages or hire, together with every thing belonging to them on board said vessel. *And it is further agreed*, that no officer or seaman belonging to the said vessel, shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at the port of her discharge, and her cargo delivered.

And it is further agreed between the master and officers of the said vessel, that whatever apparel, furniture and stores, each of them may receive into their charge, belonging to said vessel, shall be accounted for on her return; and in case anything shall be lost or damaged through their carelessness and insufficiency, it shall be made good by such officer or seaman by whose means it may happen, to the master and owner of the said vessel. And whereas, it is customary for the officers and seamen on the vessel's return home, in the harbor, and while the vessel is delivering her cargo, to go on shore each night to sleep, greatly to the prejudice of such vessel and freighters : *Be it further agreed* by the said parties, that neither officer or seamen shall, on any pretence whatsoever, be entitled to such indulgence, but shall do their duty by day in discharge of her cargo, and keep such watch by night as the master shall think proper to order, for the preservation of the same. And whereas, it often happens that part of the cargo is embezzled, after being safely delivered into lighters ; and as such losses are made good by the owners of the vessels ; *Be it therefore agreed* by these presents, that whatever officer or seaman the master shall think proper to appoint, shall take charge of her cargo in the lighters, and go with it to the lawful key, and there deliver his charge to the vessel's husband,

or his representative, or see the same safely landed. That each seaman and mariner who shall well and truly perform the above-mentioned voyage, (provided always that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores,) shall be entitled to the payment of the wages or hire that may become due to him, pursuant to this agreement, as to their names is severally affixed and set forth.

For the due performance of each and every of the above-mentioned articles and agreements, and acknowledgment of their being voluntary and without compulsion, or any other clandestine means being used, agreed to and signed by us; and in testimony thereof, we have each and every one of us affixed our hands, the month and day against our names affixed, and in the year of our Lord one thousand eight hundred and

Time agreed to enter on board for duty.	Men's names.	Stations.	Witnesses to their signing.	Advance wages.	Wages per month.	Privilege.	Time of discharge.	Months and days in pay.	Whole wages.	Hospital money.	Wages due.

FORM OF A BILL OF SALE OF A REGISTERED SHIP.

To all people to whom this present bill of sale shall come, (*here insert the names of the grantors;*) send greeting.

Know ye that the said for and in consideration of to in hand, well and truly paid, at or before the ensealing and delivery of these presents, by the receipt whereof do hereby acknowledge, and therewith fully and entirely satisfied and contented, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said all the hull or body of the good together with all and singular her now lying at and at the port of the certificate of whose registry is as follows, viz:

In pursuance of an act of Congress of the United States of America, entitled "An act concerning the registering and recording of ships or vessels;" having taken and subscribed the oath required by the said act; and having that only owners of the ship or vessel called the of whereof is at present master, and is a citizen of the United States, and that the said ship or vessel was (*here insert where built, and by whom.*) And (*here insert the surveyor's name,*) having certified that the said ship or vessel has deck and mast : and that her length is ; her breadth ; her depth ; and that she measures tons; that she is , has and head ; and the said having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said has been duly registered at the port of

Given under hand and seal at the port of this day of in the year one thousand eight hundred and

To have and to hold the said granted and bargained and premises, with all the appurtenances, unto the said heirs, executors, administrators or assigns, to only proper use, benefit and behoof forever. And the said do avouch to be the true and lawful owner of the said and her appurtenances, and have in full power, good right, and lawful authority to dispose of the said and her appurtenances, in manner as aforesaid. And furthermore, the said do hereby covenant and agree to warrant and defend the said and appurtenances, against the lawful claims and demands of all persons whatsoever, unto the said

In witness whereof the said ha hereunto set hand and seal the day of in the year of our Lord one thousand eight hundred and

Signed, sealed and delivered in presence of us.

PROTEST.

Note. It is usual for ship-masters immediately after arriving in port from a foreign voyage, to enter a general protest, to be extended upon afterwards. Where practicable, it should be before a notary public. This he does, whether he is aware of having sustained any damage from perils of the sea, or not. If, afterwards, either at that port, or at any other, he finds that the ship or cargo did sustain damage from such perils, while on the passage, he may then extend upon his *general* protest; the form of which is given below.

FORM OF PROTEST.

United States of America:

State of Virginia, District of Norfolk.

To all to whom these presents doth, shall or may concern:

I, Henry H. Dentzel, of the borough of Norfolk, in the

state of Virginia, a public notary, under the great seal of the state, commissioned and duly qualified, SEND GREETING:

Know ye, that on the *second* day of *September*, in the year of our Lord one thousand eight hundred and *thirty-nine*, before me, the said notary, appeared *Browning O. Killy, 3d*, master of the *schooner Mercy, of Dartmouth*, of the burthen of *ninety-nine* tons, or thereabouts, and noted in due form of law, with me, the said notary, his protest, for the uses and purposes hereafter mentioned: and now at this day, to wit, the day of the date hereof, again comes the said *Browning O. Killy, 3d*, before the said notary, at Norfolk aforesaid, and requires me to extend his protest; and together with the said *Browning O. Killy, 3d*, also came *James Dall*, mate, and *Collins W. Smith and Elias Russel*, seamen, of and belonging to the said *schooner*, all of whom being by me duly sworn on the holy Evangelists of Almighty God, did severally declare and depose as follows: That is to say, that on the *twenty-sixth* day of *August last*, he, the said *Browning O. Killy, 3d*, set sail and departed in and with the said *schooner*, as master thereof, from the port of *New Bedford*, having on board the said *schooner* a cargo of *Oil, Candles, and Nails*, bound to *Norfolk*. That the said *schooner* was then tight, staunch and strong, had her cargo well and sufficiently stowed and secured, and was well masted, manned, tackled, victualed, apparelled and appointed, and was, in every respect, fit for sea and the voyage she was about to undertake; that on the day of their departure the breezes were

(Here follows a general narrative (if deemed necessary,) of the course of events on the voyage, up to the time of the disaster, with a particular statement of the several losses and injuries sustained, with the causes thereof fully and particularly set forth.)

And the said appearers further say, that as all the damage and injury which already has, or may hereafter appear to have happened or accrued to the said *schooner*, or her said cargo, has been occasioned solely by the circumstances hereinbefore stated, and cannot, nor ought not to be attributed to any in-

sufficiency of the said *schooner*, or default of him, this deponent, his officer or crew. He now requires me, the said notary, to make his protest and this public act thereof, that the same may serve and be of full force and value as of right shall appertain. And therefore the said *Browning O. Killy, 3d*, doth protest, and I, the said notary, at his special instance and request do, by these presents, publicly and solemnly protest against *winds, weathers, gales, seas and leaks*, against all persons whom it doth, shall, or may concern, and against all and every accident, matter and thing, had and met with as aforesaid, whereby, or by means whereof, the said *schooner* or her cargo, have received, or hereafter shall have appeared to have suffered or sustained damage or injury—for all losses, costs, charges, expenses, damages and injury which the said *Browning O. Killy, 3d*, or the owner or owners of the said *schooner*, or the owners, freighters or shippers of the said cargo, already have, or may hereafter pay, sustain, incur, or be put into by, or on account of the premises, or for which the insurer or insurers is, or are respectively liable to pay, or make contribution or average, according to custom, or their respective contracts or obligations, and that no part of such losses and expenses already incurred, or hereafter to be incurred, do fall on him, the said *Browning O. Killy, 3d*, his officers or crew.

Thus done and protested, in the borough of Norfolk, and state of Virginia, this *seventh* day of *September*, in the year of our Lord one thousand eight hundred and *thirty-nine*.

In testimony whereof, I have caused the said applicants to sign these presents, and I, the said notary, have subscribed my name, and have also caused my seal of office to be hereunto affixed, the day and year last above written.

HENRY H. DENTZEL,
Notary Public.

Browning O. Killy, 3d,
James Dall,
Collins W. Smith,
Elias Russell.

Date Due

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